

United States
Circuit Court of Appeals
For the Ninth Circuit.

JAMES W. BUTLER, MARY L. BUTLER, MARY SEGUIN,
CLARA VERSCHOOR, LILLIAN FITZGERALD, DA-
VID J. LEWIS, ELIZABETH A. LEWIS, JOHN
LINGIE SMITH, ELLA RUTH SMITH, PATRICK J.
LEONARD, ANNIE LEONARD, STEPHEN C. PERRY,
CARLE HILLEBRAND, MRS. C. C. E. HILLEBRAND,
FRED HUSSEY, MRS. H. L. GOOCH, OSCAR SWAN-
SON, MARVIN WALTER WAFTER, GEORGE W.
IRVINE, BETTY DU BOIS, MRS. I. B. BRAWLEY,
MARGARET JOHNSTONE, JAMES J. PHELAN, J. H.
PEGRAM, MRS. J. H. PEGRAM, MARIE C. KNIEF,
AMOS WASHINGTON, DOROTHY LEWITZ, MARIE
C. CROSS, VIOLETTE M. CROSS, CHARLES L. FORS-
BERG and MADGE McNAUL,

Appellants,

vs.

GRACE APPLETON McKEY,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Northern District of California,
Southern Division

APR 1 - 1943

PAUL P. O'BRIEN,

CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Grace Appelton McKey.

In the Southern Division of the United States District Court for the Northern District of California.

No. 4103R

In Equity

JAMES W. BUTLER; MARY L. BUTLER;
MARY SEGUIN; CLARA VERSCHOOR;
LILLIAN FITZGERALD; DAVID J.
LEWIS; ELIZABETH A. LEWIS; JOHN
LINGIE SMITH; ELLA RUTH SMITH;
PATRICK J. LEONARD; ANNIE LEON-
ARD; STEPHEN C. PERRY; CARLE HIL-
LEBRAND; MRS. C. C. E. HILLEBRAND;
FRED HUSSEY; MRS. H. L. GOOCH; OS-
CAR SWANSON; MARVIN WALTER WA-
FER; GEORGE W. IRVINE, BETTY DU
BOIS; MRS. I. B. BRAWLEY; MARGARET
JOHNSTONE; JAMES J. PHELAN; J. H.
PEGRAM; MRS. J. H. PEGRAM; MARIE
C. KNIEF; AMOS WASHINGTON; DORO-
THY LEWITZ; MARIE C. CROSS; VIO-
LETTE M. CROSS; CHARLES L. FORS-
BERG; and MADGE McNAUL;

Plaintiffs,

vs.

CHARLES M. PUSEY; SIEGFRIED SCHU-
LEIN, JUNIOR; SIEGFRIED SCHULEIN;
WILLIAM FORSSTROM; GRACE APPLE-
TON McKEY; E. E. FRICKE; ERMA A. LA

NOUE; MARK M. BAKER; ERMA M. ASZMAN; LEONE B. HILL; MRS. L. E. HILL; and KATHRYN RIDDELL;

Defendants.

BILL OF COMPLAINT UPON STOCKHOLDERS STATUTORY LIABILITY [1*]

Plaintiffs above-named complain of defendants above-named, and for cause of action, allege as follows:

I.

That plaintiffs herein bring this suit on behalf of themselves and on behalf of all of the creditors of the Woodlawn Trust and Savings Bank, which at all of the times herein mentioned has been and now is a banking corporation organized and existing under and by virtue of the laws of the State of Illinois; that besides these plaintiffs, there are many thousands of other creditors of said Woodlawn Trust and Savings Bank whose claims against said Bank are of a nature and character similar to those of these plaintiffs, and these plaintiffs and all said other creditors have a common interest in the subject-matter of this suit, and these plaintiffs hereby undertake to represent the rights of all creditors and to maintain and conduct this as a representative suit for the benefit of all of the creditors of said Bank who may have claims of a character similar to those of these plaintiffs as herein-after set forth.

* Page numbering appearing at foot of page of original certified Transcript of Record.

II.

That plaintiffs above-named, excepting plaintiff Charles L. Forsberg, are citizens and residents of the State of Illinois; That said Charles L. Forsberg is a citizen and resident of the State of Alabama; that the defendants herein above-named are citizens and residents of the State of California; that the matter in controversy herein exceeds, exclusive of interest and costs, the sum or value of \$3,000.00.

III.

That the Constitution of the State of Illinois, more particularly Article XI, Section 6 thereof, at all of the times herein mentioned has read and provided, and does now read and provide, as follows: [2]

“Every stockholder in a banking corporation or institution shall be individually responsible and liable to its creditors over and above the amount of stock by him or her held to an amount equal to his or her respective shares so held for all its liabilities accruing while he or she remains such stockholder.”

IV.

That at all of the times herein mentioned the statutes of the State of Illinois, more particularly that certain statute entitled “An Act to revise the law with relation to banks and banking,” approved June 23, 1919, as amended June 28, 1923, and as amended June 4, 1929, which Act is commonly known as the banking law of Illinois, has

provided, and now does provide, that when any banking corporation shall have gone into liquidation under the provisions of said Act, the individual statutory liability of its stockholders, as hereinabove alleged, may be enforced by any creditor of such bank, by suit in equity in the nature of a creditor's bill, brought by said creditor on behalf of himself and all other creditors of such bank against the stockholders thereof.

V.

That said Woodlawn Trust and Savings Bank is a corporation organized and authorized to commence business on or about the 27th day of April, A.D. 1905 under and in pursuance of an Act of the General Assembly of the State of Illinois, entitled "An Act concerning corporations with banking powers," approved June 16, 1887, as subsequently amended, which said Act and amendments thereto were duly submitted to a vote of the people of this State, and ratified by them in accordance with the Constitution of this State; that the purpose for which said Woodlawn Trust and Savings Bank was organized was for discount and deposit, buying and selling exchange, and doing a general banking business, excepting the issuance of bills to circulate as money, and with power to loan money on personal and real estate security; that the capital stock of said Woodlawn Trust and Savings Bank at the time of its organization consisted of \$200,000.00 divided into 2000 shares of the

par value of \$100.00 each; and certificates for the 2000 shares originally authorized were issued and delivered to the subscribers therefor upon the organization of said Bank; that the capital stock of said Bank continued to be \$200,000.00 until, to-wit: January 13, 1919, on which date, pursuant to resolutions duly adopted at a meeting of the stockholders of said Bank, by which it was resolved to increase the capital stock of said Bank from \$200,000.00 to \$250,000.00, divided into 2500 shares of the par value of \$100.00 each, the capital stock was by appropriate entries on the books of said Bank so increased, and certificates representing the 500 shares of additional stock authorized by said resolution were issued to the subscribers therefor; that the capital stock of said Woodlawn Trust and Savings Bank continued to be \$250,000.00 until, to-wit: December 27, 1920, on which date, pursuant to resolutions duly adopted at a meeting of the stockholders of said Bank, by which it was resolved to increase the capital stock of said Bank from \$250,000.00 to \$400,000.00, divided into 4000 shares of the par value of \$100.00 each, the capital stock was by appropriate entries on the books of said Bank so increased, and certificates representing the 1500 shares of additional stock authorized by said resolution were issued to the subscribers therefor; that the capital stock of said Bank continued to be \$400,000.00 until, to-wit: January 12, 1924, on which date, pursuant to resolutions duly adopted at a meeting of the stockholders of said Bank, by

which it was resolved to increase the capital stock of said Bank from \$400,000.00 to \$500,000.00, divided into 5000 shares of the par value of \$100.00 each, the capital stock was by appropriate entries [4] on the books of said Bank so increased, and certificates representing the 1,000 shares of additional stock authorized by said resolution were issued to the subscribers therefor; that the capital stock of said Bank continued to be \$500,000.00, until, to-wit: March 18, 1927, on which date pursuant to resolutions duly adopted at a meeting of the stockholders of said Bank, by which it was resolved to increase the capital stock of said Bank from \$500,000.00 to \$600,000.00, divided into 6,000 shares of the par value of \$100.00 each, the capital stock was by appropriate entries on the books of said Bank so increased, and certificates representing the 1,000 shares of additional stock authorized by said resolution were issued to the subscribers therefor; and that the capital stock of said Woodlawn Trust and Savings Bank continued to be \$600,000.00 from the 18th day of March, 1927, to and including June 22, 1932; that from the date of its organization up to and including the 22nd day of June, A.D. 1932, said Woodlawn Trust and Savings Bank carried on an extensive banking business in the City of Chicago, with offices located at 1180 East Sixty-third Street, in said City and County, making loans, accepting deposits and in general doing the business for which it was organized.

VI.

That at the close of business on the 22nd day of June, A. D. 1932, the said Woodlawn Trust and Savings Bank was indebted to various persons, firms and corporations, including these plaintiffs, according to its books of account, in the amount of, to-wit: \$4,032,246.00, for savings deposits, certificates of deposit, Christmas savings accounts deposits, individual commercial deposits, cashier's checks, postal savings, certified checks, bills payable and discounts, and had other liabilities to creditors in amounts unknown to these plaintiffs; that at the close of busi- [5] ness on the 22nd day of June, A.D. 1932, the assets of said Bank, at the values at which the same were carried on the books and records of said Bank, amounted to \$4,760,948.22; that these plaintiffs are informed and believe, and so state the fact to be, that among the assets shown on the books of said Bank as its resources, and carried as assets thereon, were numerous loans, mortgages, bonds, accounts receivable and other items which were worthless, and that the value of divers other items of said resources did not equal the amounts respectively at which said items of resources were carried upon the books of said Bank, so that upon said last mentioned date the liabilities of said Bank were in excess of the assets of said Bank, and the deficiency in the assets of said Bank was, at said last mentioned date, in excess of the aggregate of its capital, surplus, reserves and undivided profits; and that said Bank was unable

to meet its liabilities as they became due in the ordinary course of business and could not pay its depositors on demand, but was wholly insolvent.

VII.

That on the 22nd day of June, 1932, by reason of the facts and circumstances aforesaid, the capital stock of said Bank had become impaired, and the condition of said Bank was such that said impairment of said capital stock could not be made good, and the business of said bank was then being conducted in an unsafe manner.

VIII.

That thereupon, on said 22nd day of June, 1932, on account of the facts and circumstances aforesaid, the said Bank was closed by resolution duly adopted by its Board of Directors, and the Auditor of Public Accounts of the State of Illinois, acting in accordance with and pursuant to the statutes and laws of the State [6] of Illinois in such cases made and provided, more particularly in accordance with and pursuant to the terms and provisions of the above-mentioned banking law of Illinois, assumed control of said Bank and closed the same, and then and there took control of its property, assets and business, all for the purpose of the reorganization or liquidation of said Bank through receivership; that since said last mentioned date said Bank has not carried on the business for which it was organized and which it had theretofore carried on as aforesaid.

IX.

That said Auditor of Public Accounts of the State of Illinois, retained possession and custody of said Bank and its assets until on, to-wit: the first day of July, A.D. 1932, on which date said Auditor of Public Accounts, pursuant to the duty imposed upon him by law and by virtue of the authority vested in him by law, more particularly by the said banking law of Illinois, determined that said Bank could not be reorganized and that the same should be liquidated through receivership, and thereupon then and there said Auditor of Public Accounts designated and appointed Harvey C. Vernon, a reputable person, as Receiver for said Bank, who thereupon, upon said last mentioned date, duly qualified as such Receiver, and as such Receiver immediately took possession of the books, records and assets of said Bank, and said Bank thereupon went into, and is now, in liquidation in accordance with Section 11 of the Banking Act of Illinois, as amended.

X.

That thereafter, on the 9th day of November, 1932, the Circuit Court of Cook County, State of Illinois, in proceedings duly commenced and prosecuted for such purpose, duly made its order and judgment ratifying, approving, and confirming the aforesaid ap- [7] pointment of said Harvey C. Vernon as Receiver of said Bank, and approving and confirming the aforesaid action taken by said Auditor of Public Accounts in the premises and his

acts in taking possession of said Bank and of its books, records, assets, property and effects for the purpose of the liquidation of said Bank; that said Harvey C. Vernon has ever since continued to act, and is still acting, as Receiver of said Bank, and at all times since his said appointment has proceeded, and is now proceeding, with the administration and liquidation of said Bank under and in accordance with the said banking law of Illinois.

XI.

That since the close of business on the 22nd day of June, 1932, said Bank has wholly ceased to do business for which it was organized, and since said last mentioned date the said banking corporation has been and now is wholly insolvent, and all of its property has been in the custody either of said Auditor of Public Accounts or of said Receivers, respectively, so that on and since the 23rd day of June, 1932, the liabilities of said Bank have been due without any demand or notice.

XII.

That each of the defendants hereinabove named was a stockholder of said Woodlawn Trust and Savings Bank, and was the owner and holder of those certain numbers of shares of stock in said Bank hereinafter set forth following their respective names, during the respective periods herein-after in this paragraph set forth; that during said respective periods of time during which each of said defendants was a stockholder as aforesaid,

divers sums amounting to the respective totals hereinafter in this paragraph set forth accrued and became due and owing to the creditors of said Bank, including these plaintiffs, constituting liabilities of said bank, [8] all of which said sums are still due and owing to said creditors, including these plaintiffs, from said Woodlawn Trust and Savings Bank, no part of which has been paid by said Bank or by any of its stockholders, or by these defendants, or any of them, as follows, to-wit:

Charles M. Pusey held 5 shares of stock from May 2, 1905 to November 26, 1918 during which period unsatisfied liabilities accrued in the total sum of \$5,294.13.

Siegfried Schulein, Junior held 2 shares of stock from December 8, 1910 to February 19, 1917 during which period unsatisfied liabilities accrued in the total sum of \$2,883.64; and said defendant also held 10 shares of stock from December 9, 1914 to February 19, 1917 during which period unsatisfied liabilities accrued in the total sum of \$1,873.85.

Siegfried Schulein held 12 shares of stock from February 19, 1917 to June 22, 1932, during which period unsatisfied liabilities accrued in the total sum of \$2,085,389.33; said defendant also held 3 shares of stock from January 10, 1919 to June 22, 1932 during which period unsatisfied liabilities accrued in the total sum of \$2,082,670.05; said defendant also held 9 shares of stock from December 27, 1920 to June 22, 1932 during which period unsatisfied

liabilities accrued in the total sum of \$2,076,591.41; said defendant also held 6 shares of stock from January 22, 1924 to June 22, 1932 during which period unsatisfied liabilities accrued in the total sum of \$2,040,872.80; and said defendant also held 6 shares of stock from February 1, 1327 to June 22, 1932 during which period unsatisfied liabilities accrued in the total sum of \$1,981,453.12.

William Forsstrom held 30 shares of stock from October 8, 1927 to June 22, 1932 during which period unsatisfied liabilities accrued in the total sum of \$1,956,206.98.

Grace Appleton McKey held 307 shares of stock from March 14, 1917 to June 22, 1932 during which period unsatisfied liabilities accrued in the total sum of \$2,085,342.86; said defendant also held 40 shares of stock from January 10, 1919 to April 13, 1920 during which period unsatisfied liabilities accrued in the total sum of \$3,787.14; said defendant also held 36 shares of stock from January 10, 1919 to June 22, 1932 during which period unsatisfied liabilities accrued in the total sum of \$2,082.670.05; said defendant also held 1 share of stock from January 21, 1919 to June 22, 1932 during which period unsatisfied liabilities accrued in the total sum of \$2,082,631.23; said defendant also held 100 shares of stock from December 27, 1920 to December 13, 1921 during which period unsatisfied liabilities accrued in the total sum of \$6,717.87; said defendant also held 106 shares of stock from December 27, 1920 to June 22, 1932 during which

period unsatisfied liabilities accrued in the total sum of \$2,076,591.41; said defendant also held 1 share of stock from January 16, 1924 to January 5, 1925 during which period unsatisfied liabilities accrued in the total sum of \$16,229.17; said defendant also held 24 shares of stock from January 16, 1924 to April 26, 1927 during which period unsatisfied liabilities accrued in the total sum of \$63,974.83; said defendant also held 25 shares of stock from January 16, 1924 to November 20, 1925 during which period unsatisfied liabilities accrued in the total sum of \$28,435.36; said defendant also held 20 shares of stock from January 16, 1924 to June 22, 1932 during which period unsatisfied liabilities accrued in the total sum of \$2,041,080.55; said defendant also held 5 shares of stock from January 16, 1924 to September 8, 1926 during which period unsatisfied liabilities accrued in the total sum of \$47,279.60; said defendant also held 10 shares of stock from January 16, 1924 to May 19, 1925 during which period unsatisfied liabilities accrued in the total sum of \$20,717.44; said defendant [10] also held 1 share of stock from January 16, 1924 to April 26, 1927 during which period unsatisfied liabilities accrued in the total sum of \$63,974.83; said defendant also held 14 shares of stock from January 16, 1924 to June 22, 1932 during which period unsatisfied liabilities accrued in the total sum of \$2,041,080.55; and said defendant also held 98 shares of stock from February 1, 1927 to September 18, 1928 during which period unsatisfied liabilities accrued in the total sum of \$81,978.93.

E. E. Frick held 10 shares of stock from April 7, 1910 to June 22, 1932 during which period unsatisfied liabilities accrued in the total sum of \$2,008,473.60; said defendant also held 2 shares of stock from January 10, 1919 to June 22, 1932 during which period unsatisfied liabilities accrued in the total sum of \$2,082,670.05; said defendant also held 1 share of stock from February 10, 1919 to June 22, 1932 during which period unsatisfied liabilities accrued in the total sum of \$2,082,594.09; said defendant also held 7 shares of stock from December 27, 1920 to June 22, 1932 during which period unsatisfied liabilities accrued in the total sum of \$2,076,591.41; said defendant also held 5 shares of stock from January 21, 1924 to June 22, 1932 during which period unsatisfied liabilities accrued in the total sum of \$2,040,953.50; and said defendant also held 5 shares of stock from January 24, 1927 to June 22, 1932 during which period unsatisfied liabilities accrued in the total sum of \$1,982,318.38.

Erma A. La Noue held 1 share of stock from October 2, 1923 to June 22, 1932 during which period unsatisfied liabilities accrued in the total sum of \$2,046,670.35.

Mark M. Baker held 3 shares of stock from October 24, 1927 to June 22, 1932 during which period unsatisfied liabilities accrued in the total sum of \$1,955,366.13. [11]

Erma M. Aszman held 1 share of stock from December 16, 1921 to October 2, 1923 during which period unsatisfied liabilities accrued in the total sum of \$23,020.87.

Leone B. Hill held 10 shares of stock from September 29, 1916 to September 25, 1925 during which period unsatisfied liabilities accrued in the total sum of \$70,575.58; said defendant also held 2 shares of stock from January 10, 1919 to September 25, 1925 during which period unsatisfied liabilities accrued in the total sum of \$67,489.42; said defendant also held 1 share of stock from December 27, 1920 to February 14, 1921 during which period unsatisfied liabilities accrued in the total sum of \$1,001.54; and said defendant also held 6 shares of stock from December 27, 1920 to September 25, 1925 during which period unsatisfied liabilities accrued in the total sum of \$61,410.78.

Mrs. L. E. Hill held 10 shares of stock from May 28, 1909 to October 18, 1911 during which period unsatisfied liabilities accrued in the total sum of \$565.99.

Kathryn Riddell held 4 shares of stock from February 1, 1927 to August 30, 1927 during which period unsatisfied liabilities accrued in the total sum of \$19,528.53.

XIII.

That said separate sums of indebtedness of said Bank, aggregating the amounts aforesaid, constitute liabilities of said Bank which severally accrued to said respective creditors thereof, including these plaintiffs, while the defendants hereinabove named were and remained such stockholders as aforesaid, and all said liabilities were and are evidenced by pass books or bank books or certificates of deposit or other evidences of indebtedness in

writing, and for which liabilities said defendants are liable to said creditors in whose behalf this suit is brought, including [12] these plaintiffs, in respective amounts up to the par value of the shares of the capital stock of said Woodlawn Trust and Savings Bank held by said defendants, respectively, as aforesaid, while said respective liabilities accrued, and said liabilities of said defendants arose and exist by virtue of the provisions of Article XI, Section 6, of the Constitution of the State of Illinois, which is hereinabove set forth, and Chapter 16a, Section 6, of the Illinois State Bar Statutes which provides as follows:

“Every stockholder in any bank or banking association organized under the provisions of this Act shall be individually responsible and liable to its creditors, over and above the amount of stock by him or her held to an amount equal to his or her respective shares so held, for all its liabilities accruing while he or she remains such stockholder. It is hereby made the duty of the president and cashier, within thirty days after organization, to file in the office of the recorder of deeds of the county in which such bank is located, a certified list of all the original stockholders, giving the number of shares of stock held by each, and thereafter a certificate of all transfer of stock, not later than ten days after such transfer. No transfer of stock shall operate as a release of liability provided in this section.”

and Chapter 16a, Section 11 of the Illinois State Bar Statutes which provides as follows:

“When any banking association, organized under this Act shall have gone into liquidation under the provisions of this section of the Act, the individual liability of the shareholders provided for by section six (6) of this Act may be enforced by any creditor of such association, by bill in equity, in the nature of a creditor’s bill, brought by such creditor on behalf of himself and all other creditors of the association against the shareholders thereof, in any court having jurisdiction in equity for the county in which such bank or banking association may have been located or established.

“The Court in which suit is instituted may appoint a receiver and require of him such bond and security as seems proper for the purpose of collecting, receiving, and disbursing the amounts due from the stockholders on account of their ownership of the stock of said Bank. Said receiver shall have authority upon the order of the court appointing him to employ such auditors and assistants as may be necessary to establish and recover the liabilities of [13] the stockholders, and may, with the approval of the court enter into compositions with insolvent stockholders, if any. The costs of such proceedings, including reasonable solicitor’s fees for complainants’ solicitors, and other necessary expenses of collection, may on the order of court, be paid out of the funds col-

lected by said receiver. The funds so collected, after the payment of the costs and expenses of collection, including solicitors' fees, shall be distributed according to law among the creditors of said bank in such manner as the court shall direct."

and the Illinois cases, interpreting said sections, which are to the following effect: Under the law of the State of Illinois as stated by its Supreme and Appellate Courts, the constitutional provision above referred to is self-executing and is a part of every banking act. A stockholder is primarily liable for the debts of the bank accruing during his ownership of the stock and continues so liable until such liabilities are paid or otherwise discharged. The liability of the stockholder is limited to the amount of the par value of the stock he held, or to the amount of liabilities accruing during the period he held his stock and still unpaid, whichever is lower. The obligation is contractual and primary in its nature, and is not penal. The stockholders are not mere sureties; they are in reality principals and are individually and personally liable to all creditors of the bank, and are answerable as original and principal debtors, owing the same debt as the bank owes. The stockholders' Liability is in the nature of a fund which is security for the common benefit of the bank's creditors. All the creditors may join and all the stockholders may be joined in a single suit, or one or more of the creditors may proceed against one or part of the stockholders without

joining all. The latter suit is a suit in equity. When one creditor sues on behalf of all other creditors, all creditors are before the Court and are equally bound by the Decree. The existence of the stockholders' liability does not depend upon the ascertainment of the existence [14] or extent of a deficiency of the bank's assets to pay creditors. Nor is a creditor obliged to delay bringing suit against the stockholders of a closed bank until the general assets of the bank have been distributed and a deficiency established, for the reason that the liability of the stockholder is definitely fixed by law as primary, direct and contractual. The liability of the stockholder may be enforced immediately upon the closing of the bank. The cause of action arises upon demand made by a creditor upon the bank to pay, and the bank's failure to do so. When a bank is closed for liquidation no demand is necessary inasmuch as it would be a useless act. The officers or agents of the bank, in making written entries in the bank's records, act as the agents and representatives, not only of the bank, but of the stockholders, regarded as unincorporated partners, and the written evidence of indebtedness is as binding upon the stockholders as upon the bank. The books and records of the bank are competent evidence against the stockholders without proof of their correctness. Where the original books are voluminous, they need not be received in evidence, but can be tendered to the opposite party for inspection and examination. Where the effect to be proved is the general result of an examination of the whole col-

lection, evidence may be given as to such result by any competent person who has examined them, providing the result is capable of being ascertained by calculation. In calculating the accruals of liabilities during the time the stockholder held his stock, the rule applied in Illinois is that it is the sum first paid in that is first drawn out; the first item on the debit side that is discharged by the first item on the credit side. In applying the above rule, it has been held that it is necessary to examine the deposit account of each depositor, ascertain the balance due him at the time the bank suspended, and [15] the dates on which the liabilities of the bank or the amount listed by such final balance accrued; which is done by beginning with the depositor's last deposit and adding thereto enough prior deposits to make up the amount of the final deposit balance. A stockholder has no right to set off any sum due him from the bank against his stock liability since the debts are owed to different parties.

XIV.

That on said 22nd day of June, 1932, said Woodlawn Trust and Savings Bank was indebted to these respective plaintiffs in the respective sums hereinafter in this paragraph stated, by reason of moneys deposited by or on behalf of said respective plaintiffs in savings deposit accounts in said Bank to their respective credit, and remaining on deposit in said Bank and not withdrawn; that the various and sundry amounts each of said plaintiffs so deposited, which remained on deposit as aforesaid.

and the respective dates on which each of said deposits were so made, are as follows, to-wit:

James W. Butler and Mary L. Butler deposited the following amounts on the following dates, to their joint and several credit, to-wit:

\$ 378.55	on	January 11, 1932
\$ 60.00	on	January 18, 1932

Mary Seguin deposited the following amounts on the following dates, to-wit:

\$ 156.00	on	Decemer 19, 1931
\$ 62.55	on	April 11, 1932

Clara Verschoor deposited the following amounts on the following dates, to-wit:

\$ 110.24	on	November 15, 1921
\$ 125.00	on	January 21, 1925

[16]

Lillian Fitzgerald deposited the following amounts on the following dates, to-wit:

\$1,100.00	on	December 2, 1931
\$ 2.75	on	January 1, 1932
\$ 104.82	on	May 10, 1932

David J. Lewis and Elizabeth A. Lewis deposited the following amounts on the following dates, to their joint and several credit, to-wit:

\$ 507.00	on	December 12, 1931
\$ 130.75	on	January 4, 1932

John Lingie Smith and Ella Ruth Smith deposited the following amount on the following date, to their joint and several credit, to-wit:

\$ 300.00	on	December 18, 1931
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Patrick J. Leonard and Annie Leonard deposited the following amounts on the following dates, to their joint and several credit, to-wit:

\$ 300.00	on	January 8, 1932
\$ 100.00	on	January 29, 1932
\$ 516.63	on	April 18, 1932
\$ 83.37	on	May 11, 1932

Stephen C. Perry deposited the following amounts on the following dates, to-wit:

\$ 149.32	on	December 7, 1931
\$.42	on	January 1, 1932
\$ 69.73	on	April 12, 1932
\$ 10.00	on	May 20, 1932
\$ 10.00	on	June 20, 1932

Carle Hillebrand and Mrs. C. C. E. Hillebrand deposited the following amounts on the following dates, to their joint and several credit, to-wit:

\$ 180.00	on	December 4, 1931
\$ 1.56	on	January 1, 1932
\$ 40.00	on	February 23, 1932

Fred Hussey deposited the following amount on the fol- [17] lowing date, to-wit:

\$ 245.17	on	May 20, 1932
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Mrs. H. L. Gooch deposited the following amounts on the following dates, to-wit:

\$ 14.34	on	July 1, 1924
\$ 60.00	on	November 13, 1924
\$ 25.00	on	Deeember 11, 1924
\$ 50.00	on	Deeember 24, 1924
\$ 15.15	on	January 1, 1925
\$ 25.00	on	February 3, 1925
\$ 60.00	on	February 7, 1925
\$ 20.00	on	February 17, 1925
\$ 25.00	on	March 24, 1925

\$ 55.00	on	April 14, 1925
\$ 20.00	on	April 28, 1925
\$ 40.00	on	May 21, 1925
\$ 15.12	on	July 1, 1925
\$ 25.00	on	August 22, 1925
\$ 50.00	on	September 15, 1925

Oscar Swanson deposited the following amounts on the following dates, to-wit:

\$ 11.23	on	August 2, 1924
\$ 50.00	on	September 2, 1924
\$ 40.00	on	October 6, 1924
\$ 15.65	on	January 1, 1925
\$ 111.32	on	February 17, 1925
\$ 17.85	on	July 1, 1925

Marvin Walter Wafer deposited the following amounts on the following dates, to-wit:

\$ 648.16	on	March 9, 1925
\$ 6.48	on	July 1, 1925

George W. Irvine deposited the following amounts on the following dates, to-wit:

\$ 836.63	on	March 19, 1924
\$ 18.54	on	July 1, 1924
\$ 81.25	on	September 15, 1924
\$ 26.87	on	January 1, 1925
\$ 16.25	on	January 19, 1925
\$ 32.50	on	February 16, 1925
\$ 28.10	on	July 1, 1925

Betty Du Bois deposited the following amounts on the following dates, to-wit: [18]

\$ 97.50	on	November 23, 1931
\$.24	on	January 1, 1932

Mrs. I. B. Brawley deposited the following amount on the following date, to-wit:

\$ 52.87	on	June 14, 1932
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Margaret Johnstone deposited the following amounts on the following dates, to-wit:

\$ 687.39	on	June 13, 1927
\$ 10.39	on	July 1, 1927

James J. Phelan deposited the following amounts on the following dates, to-wit:

\$ 157.56	on	June 16, 1927
\$ 105.90	on	June 27, 1927
\$ 27.39	on	July 1, 1927
\$ 1.95	on	July 1, 1927
\$ 50.00	on	July 22, 1927
\$ 50.00	on	August 3, 1927
\$ 15.00	on	August 16, 1927

J. H. Pegram and Mrs. J. H. Pegram deposited the following amounts on the following dates, to their joint and several credit, to-wit:

\$ 50.00	on	November 11, 1908
\$ 30.00	on	September 8, 1909

Marie C. Knief deposited the following amounts on the following dates, to-wit:

\$ 40.00	on	May 15, 1909
\$ 40.00	on	September 21, 1909
\$ 20.00	on	December 3, 1909
\$ 30.00	on	April 8, 1910
\$ 20.00	on	September 3, 1910
\$ 20.00	on	October 4, 1910
\$ 25.00	on	November 4, 1910
\$ 30.00	on	May 11, 1911
\$ 40.00	on	March 2, 1911
\$ 25.00	on	January 4, 1912
\$ 25.00	on	March 6, 1912
\$ 25.00	on	May 11, 1912
\$ 30.00	on	March 4, 1913
\$ 30.00	on	January 8, 1913

Amos Washington deposited the following amounts on the following dates, to-wit:

\$ 50.00	on	October 19, 1910
\$ 20.00	on	October 4, 1910
\$ 25.00	on	August 7, 1911
\$ 40.00	on	July 19, 1913

Dorothy Lewitz deposited \$50.00 on the 23rd day of June, 1913.

Marie C. Cross and Violette M. Cross deposited the following amounts on the following dates, to their joint and several credit, to-wit:

\$ 132.61	on	April 26, 1930
\$ 100.00	on	July 18, 1929
\$ 292.00	on	January 14, 1929
\$ 125.00	on	July 14, 1925
\$ 250.00	on	December 30, 1924
\$ 130.00	on	August 14, 1924
\$ 250.00	on	December 30, 1924
\$ 130.00	on	August 14, 1924
\$ 125.00	on	July 14, 1925
\$ 70.00	on	January 15, 1925

Charles L. Forsberg deposited the following amounts on the following dates, to-wit:

\$ 135.00	on	November 12, 1925
\$ 80.00	on	September 20, 1927
\$ 105.00	on	August 20, 1927
\$ 135.00	on	July 30, 1927
\$ 170.00	on	July 11, 1927

Madge McNaul deposited \$109.28 on the 2nd day of August, 1920.

XV.

That said amount of indebtedness, in the instance of these plaintiffs, was on the 22nd day of June, 1932, and still is, over and above all set-offs

and counterclaims which said Bank had or might have had against said plaintiffs respectively; that said sums of money were deposited by these plaintiffs, and the liabilities of said Bank to said plaintiffs accrued, together with the [20] liabilities of said Bank for the similar indebtedness of said Bank to its said other creditors, from time to time while the defendants herein-named were such stockholders as aforesaid; that no part of said indebtedness to these plaintiffs has ever been paid to any of these plaintiffs by said Bank or by said defendants or any of them, or by any of the other stockholders of said Bank, and said indebtedness to these respective plaintiffs constitute liabilities of said Bank for which the said stockholders, including these defendants, are liable under and by virtue of the provision of the Illinois Constitution hereinabove referred to.

XVI.

That pursuant to the provisions of said Illinois banking laws, more particularly Chapter 16a, Section 11 of the Illinois State Bar Statutes which is hereinabove set forth, acting in accordance with the authority expressly conferred therein, said Harvey C. Vernon, Receiver appointed for said Bank as aforesaid, heretofore duly employed auditors, who were properly qualified and certified public accountants, to examine the books and records and affairs of said Bank and to establish the respective liabilities of the stockholders thereof, including the stockholders' liability of these defendants; that thereafter said auditors made a complete and

proper audit and examination of said books, records and affairs of said Bank and thereby established the liabilities of said stockholders, including that of these defendants, whereby the respective stockholders' liability of each of these defendants was found and established to be in the respective amounts hereinafter stated; that thereafter said audit, establishing the respective liabilities of the stockholders of said Bank, including that of these defendants, was duly proved and established in proceedings duly held and conducted for that purpose before a Master [21] in Chancery who had been theretofore duly appointed by the Circuit Court of Cook County in those certain proceedings then and now pending before said Court, being the same proceedings in which said Receiver was appointed as is hereinabove more particularly stated, namely, in that certain suit in equity, numbered 560059, entitled "Stella M. Murphy, et al, Plaintiffs, vs. Woodlawn Trust and Savings Bank, an Illinois banking corporation, et al, Defendants"; that the defendants herein at all of the times herein mentioned were named and designated as parties defendant in said last mentioned suit; that thereafter said Master in Chancery duly reported to said Circuit Court of Cook County, in said proceedings, the said audit so proved before him as aforesaid; that said Circuit Court thereupon duly made and rendered and caused to be filed its judgment and decree in said proceedings approving, ratifying, and confirming the said report of said Master and the said audit; that during all of the various and sundry

times while defendants were stockholders in said Bank as aforesaid, Chapter 16a, Section 11 of the Illinois State Bar Statutes as hereinabove quoted was and remained a part of the banking law in full force and effect in said State of Illinois; that by reason of the foregoing facts and circumstances, and by virtue of said last mentioned judgment and decree of said Circuit Court of Cook County which ratified, approved and confirmed the said audit so made as aforesaid, the respective liabilities of each of these defendants as stockholders of said Bank became and now is fixed and established in the amounts hereinafter set forth opposite their respective names as follows, to-wit: The liability of Charles M. Pusey was and is \$500.00; the liability of Siegfried Schulein, Junior, was and is \$1,200.00; the liability of Siegfried Schulein was and is \$3,600.00; the liability of William Forsstrom was and is \$3,000.00; the liability of Grace [22] Appleton McKey was and is \$75,305.01; the liability of E. E. Fricke was and is \$3,000.00; the liability of Erma A. La Noue was and is \$100.00; the liability of Mark M. Baker was and is \$300.00; the liability of Erma M. Aszman was and is \$100.00; the liability of Leone B. Hill was and is \$1,900.00; the liability of Mrs. L. E. Hill was and is \$565.99; and the liability of Kathryn Riddell was and is \$400.00.

XVII.

That the unsatisfied liabilities of said Woodlawn Trust and Savings Bank to its creditors, including these plaintiffs, which accrued during the respective

periods designated in Paragraph XII, as established and determined by said audit and said judgment and decree of said Circuit Court of Cook County, amounts to the sums stated in said last mentioned Paragraph; that by reason of the premises and of the facts and circumstances hereinabove stated and by virtue of the provisions of the Constitution of the State of Illinois hereinabove quoted, each of the defendants herein is liable to the plaintiffs herein as creditors of said Bank in the sums stated in the last Paragraph hereinabove set forth.

Wherefore, plaintiffs pray judgment against the defendants herein in the respective amounts hereinabove set forth or in such other amounts as the Court may find them liable, respectively, together with interest thereon at the rate of 7% per annum from the 23rd day of June, 1932, and together with their costs of suit incurred herein; that the Clerk of this Court be instructed and directed to issue duplicate writs or subpoenas against such of the defendants herein as may reside in other Districts contained in the State of California, directed to the respective Marshals of such other Districts; and that plaintiffs may have such other [23] and further or different relief as may be meet and proper in the premises.

DINKELSPIEL & DINKEL-SPIEL

Attorneys for Plaintiffs.

United States of America,
State of California,
City and County of San Francisco—ss.

Martin J. Dinkelspiel, being first duly sworn, deposes and says:

That he is a member of the law firm of Dinkelspiel & Dinkelspiel, attorneys for plaintiffs in the foregoing action named; that as such he is duly authorized to make and does make this verification for and on behalf of said plaintiffs; that the reason affiant makes this verification is that said plaintiffs reside outside and are absent from the City and County of San Francisco, State of California, wherein affiant and said attorneys have their offices; that affiant has read the foregoing complaint and knows the contents thereof; that the same is true of his own knowledge excepting as to such matters as are therein stated on information or belief; and that as to those matters he believes it to be true.

MARTIN J. DINKELSPIEL

Subscribed and sworn to before me this 18th day of November, 1936.

[Seal] **LOUIS WIENER**
Notary Public in and for the City and County of
San Francisco, State of California.

[Endorsed]: Filed Nov. 19, 1936 [24]

District Court of the United States
Northern District of California
Southern Division

MD No. 22414 Civil. Received Nov. 19, 1936. U. S.
Marshal's Office, San Francisco, Calif.

No. 4103-R

In Equity

SUBPOENA AD RESPONDENDUM

The President of the United States of America
To Charles M. Pusey; Siegfried Schulein, Junior;
Siegfried Schulein; William Forsstrom; Grace
Appleton McKey; E. E. Fricke; Erma A. La
Noue; Mark M. Baker; Erma M. Aszman;
Leone B. Hill; Mrs. L. E. Hill; and Kathryn
Riddell; Defendants,

Greeting:

You Are Hereby Commanded, that you be and appear in the Southern Division of the United States District Court for the Northern District of California, aforesaid, at the Court Room in the City of San Francisco, within twenty days after service hereof, to answer a Bill of Complaint exhibited against you in said Court by James W. Butler; Mary L. Butler; Mary Seguin; Clara Verschoor; Lillian Fitzgerald; David J. Lewis; Elizabeth A. Lewis; John Lingie Smith; Ella Ruth Smith; Patrick J. Leonard; Annie Leonard; Stephen C. Perry; Carle Hillebrand; Mrs. C. C. E. Hillebrand; Fred Hussey; Mrs. H. L. Gooch; Oscar Swanson;

Marvin Walter Wafer; George W. Irvine; Betty Du Bois; Mrs. I. B. Brawley; Margaret Johnstone; James J. Phelan; J. H. Pegram; Mrs. J. H. Pegram; Marie C. Knief; Amos Washington; Dorothy Lewitz; Marie C. Cross; Violette M. Cross; Charles L. Forsberg; and Madge McNaul; Plaintiffs, who are citizens of the State of Illinois and to do and receive what the said Court shall have considered in that behalf.

Witness, the Honorable Michael J. Roche, Judge of said District Court, this 19th day of November in the year of our Lord one thousand nine hundred and thirty-six and of our Independence the 161st.

[Seal] WALTER B. MALING
Clerk.

By J. P. WELSH

Deputy Clerk.

**Memorandum pursuant to Rule 12, rules of practice
for the Courts of Equity of the United States**

You are hereby required to file your answer or other defense in the above suit on or before the twentieth day after service, excluding the day thereof, of this subpoena, at the Clerk's Office of said Court, pursuant to said Bill: otherwise the said Bill may be taken pro confesso.

WALTER B. MALING
Clerk

By J. P. WELSH
Deputy Clerk.

[Endorsed]: Filed Nov. 27, 1936. [25]

RETURN ON SERVICE OF WRIT

United States of America,
Northern District of Calif.—ss.

I hereby certify and return that I served the annexed Subpoena in Equity on the therein-named Charles M. Pusey, together with copy of complaint, by handing to and leaving a true and correct copy thereof with Charles M. Pusey at Oakland, in said District on the 20th day of November, 1936.

GEORGE VICE
U. S. Marshal
By J. R. CUNNINGHAM
Deputy [25-A]

District Court of the United States
Northern District of California
Southern Division

No. 4103-R.

In Equity

SUBPOENA AD RESPONDENDUM

The President of the United States of America
To Charles M. Pusey, Siegfried Schulein, Junior;
Siegfried Schulein; William Forsstrom, Grace
Appleton McKey; E. E. Fricke; Erma A. La
Noue; Mark M. Baker; Erma M. Aszman;
Leone B. Hill; Mrs. L. E. Hill; and Kathryn
Riddell; Defendants,

Greeting:

You Are Hereby Commanded, that you be and appear in the Southern Division of the United States District Court for the Northern District of California, aforesaid, at the Court Room in the City of San Francisco, within twenty days after service hereof, to answer a Bill of Complaint exhibited against you in said Court by James W. Butler; Mary L. Butler; Mary Seguin; Clara Verschoor; Lillian Fitzgerald; David J. Lewis; Elizabeth A. Lewis; John Lingie Smith; Ella Ruth Smith; Patrick J. Leonard; Annie Leonard; Stephen C. Perry; Carle Hillebrand; Mrs. C. C. E. Hillebrand; Fred Hussey; Mrs. H. L. Gooch; Oscar Swanson; Marvin Walter Wafer; George W. Irvine; Betty Du Bois; Mrs. I. B. Brawley; Margaret Johnstone; James J. Phelan; J. H. Pegram; Mrs. J. H. Pegram; Marie C. Knief; Amos Washington; Dorothy Lewitz; Marie C. Cross; Violette M. Cross; Charles L. Forsberg; and Madge McNaul; Plaintiffs, who are citizens of the State of Illinois and to do and receive what the said Court shall have considered in that behalf.

Witness, the Honorable Michael J. Roche, Judge of said District Court, this 19th day of November in the year of our Lord one thousand nine hundred and thirty-six and of our Independence the 161st.

[Seal] WALTER B. MALING,
Clerk.

By J. P. WELSH
Deputy Clerk.

MEMORANDUM PURSUANT TO RULE 12,
RULES OF PRACTICE FOR THE COURTS
OF EQUITY OF THE UNITED STATES.

You Are Hereby Required to file your answer or other defense in the above suit on or before the twentieth day after service, excluding the day thereof, of this subpoena, at the Clerk's Office of said Court, pursuant to said Bill: otherwise the said Bill may be taken Pro Confesso.

WALTER B. MALING
Clerk.

By J. P. WELSH
Deputy Clerk.

[Endorsed]: Filed Mar. 15, 1937. [26]

The undersigned, Walter B. Maling, as Clerk of the United States District Court for the Northern District of California, hereby certifies that the within duplicate subpoena ad respondendum is a true and correct copy of the writ issued out of said Court this date in the within entitled action.

[Seal] WALTER B. MALING,
 Clerk
By J. P. WELSH
Deputy Clerk

Southern District of California, ss.

I hereby certify and return, that on the 30th day of November, 1936 I received the within Subpoena in Equity and that after diligent search, I am un-

able to find the within-named defendant, Grace Appleton McKey within my district.

ROBERT E. CLARK

United States Marshal.

By FLOYD S. KEARNS

Deputy United States Marshal. [27]

Sou. District of California, ss.

I hereby certify and return, that on the 10th day of Feb., 1937 I received the within Subpoena and that after diligent search, I am unable to find the within-named defendant Grace Appleton McKey within my district.

ROBERT E. CLARK

United States Marshal.

By F. L. BESSER

Deputy United States Marshal. [28]

So. District of Cal., ss.

I hereby certify and return, that on the 16 day of Dec., 1936 I received the within Summons and that after diligent search, I am unable to find the within-named defendant Grace Apelton McKey within my district.

ROBERT E. CLARK

United States Marshal.

By J. P. LAVELLE

Deputy United States Marshal. [29]

Southern District of California, ss.

I hereby certify and return, that on the 2nd day of December, 1936 I received the within Subpoena and that after diligent search, I am unable to find the within-named defendant William Forsstrom within my district.

ROBERT E. CLARK

United States Marshal

By THOS. H. LYMING

Deputy United States Marshal. [30]

So. District of Cal., ss.

I hereby certify and return, that on the 1st day of Dec. 1936 I received the within Writ and that after diligent search, I am unable to find the within-named defendant Erma M. Aszman within my district.

ROBERT E. CLARK

United States Marshal.

By J. B. BROOKE

Deputy United States Marshal. [31]

United States Marshal's Office
Southern District California

I Hereby Certify and Return, that I received the within writ on the 4th day of February, 1937, and personally served the same on the 9th day of February, 1937, on Ernest E. Fricke by delivering to and leaving with Mrs. Ernest E. Fricke an adult

person, who is a member or resident in the family of Ernest E. Fricke, said defendant named therein, at Los Angeles, County of Los Angeles in said District, an attested copy thereof, at the dwelling house or usual place of abode of said Ernest E. Fricke, one of said defendants herein.

Los Angeles, California, February 9th, 1937.

ROBERT E. CLARK,
U. S. Marshal.

By FLOYD S. KEARNS
Deputy. [32]

United States Marshal's Office
Southern District of California

I Hereby Certify and Return, that I received the within writ on the 9th day of January, 1937, and personally served the same on the 9th day of January, 1937, on Erma A. La Noue, by delivering to and leaving with R. G. La Noue, an adult person, who is a member or resident in the family of Erma A. La Noue, said defendant named therein, at Los Angeles, County of Los Angeles, in said District, an attested copy thereof, at the dwelling house or usual place of abode of said Erma A. La Noue, one of said defendants herein.

Los Angeles, California, January 9th, 1937.

ROBERT E. CLARK,
U. S. Marshal.

By GEO. V. ROSSINI
Deputy. [33]

RETURN ON SERVICE OF WRIT

United States of America,
So. District of Cal.—ss.

I hereby certify and return that I served the annexed Subpoena on the therein-named Mark M. Baker by handing to and leaving a true and correct copy thereof with him personally at Los Angeles in said District on the 2nd day of Dec., 1936.

ROBERT E. CLARK

U. S. Marshal

By J. B. BROOKE

Deputy. [34]

RETURN ON SERVICE OF WRIT

United States of America,
So. District of Cal.—ss.

I hereby certify and return that I served the annexed subpoena on the therein-named Mrs. Leone B. Hill by handing to and leaving a true and correct copy thereof with her personally at Glendale in said District on the 3rd day of Dec., 1936.

ROBERT E. CLARK

U. S. Marshal.

By J. B. BROOKE

Deputy. [35]

RETURN ON SERVICE OF WRIT

United States of America,
Southern District of Calif.—ss.

I hereby certify and return that I served the

annexed Subpoena in Equity on the therein-named Kathryn Riddell by handing to and leaving a true and correct copy thereof with Kathryn Riddell personally at Hermosa Beach, Calif. in said District on the 11th day of Dec., 1936.

ROBERT E. CLARK,
U. S. Marshal.

By FLOYD S. KEARNS
Deputy. [36]

In the District Court of the United States
Northern District of California
Southern Division
Issued Subpoena
No. 4103R

JAMES W. BUTLER, et al.,
Plaintiffs,
vs.

CHARLES M. PUSEY, et al.,
Defendants.

PRAECIPE

To the Clerk of Said Court:

Sir: Please issue Alias Subpoena Ad Respondendum in the above-entitled case against defendants Siegfried Schulein, Junior; Siegfried Schulein; William Forsstrom; Grace Appleton McKey; and Erma A. Aszman.

Previous subpoenas issued in said action have heretofore been returned not executed as to said defendants.

This request is made pursuant to Equity Rule No. 14.

3/15/37.

(Sgd.) DINKELSPIEL & DINKELSPIEL
 Attorneys for Plaintiffs.

[Endorsed]: Filed Mar. 15, 1937. [37]

[Title of Court and Cause.]

ORDER DESIGNATING AND APPOINTING
PERSON OTHER THAN MARSHALL TO
SERVE PROCESS.

It appearing to the satisfaction of the Court that, after diligent search, the United States Marshall for the Southern District of California has been unable to effect service of the subpoena ad respondentum upon certain of the defendants in the above-entitled action, namely, Siegfried Schulein, Junior; Siegfried Schulein, William Forsstrom, Grace Appleton McKey and Emma A. Aszman; and good cause appearing therefor, now, on motion of Dinkelspiel & Dinkelspiel, attorneys for plaintiffs in the above-entitled action, it is hereby:

Ordered that Leo K. Gold, an adult person, of Los Angeles, California, be, and he hereby is, ap-

pointed and designated as the person to serve said subpoena ad respondendum upon said defendants hereinabove named, as well as such alias or other subpoenas as may have been or may hereafter be issued in the above-entitled suit against the said defendants or any of them.

Dated: At San Francisco, California, March 15, 1937.

A. F. ST. SURE

United States District Judge.

[Endorsed]: Filed Mar. 15, 1937. [38]

[Title of District Court and Cause.]

SUMMONS IN A CIVIL ACTION

To the above named Defendant: Grace Appleton
McKey:

You are hereby summoned and required to serve
upon

DINKELSPIEL & DINKELSPIEL
plaintiff's attorney, whose address is:

Dinkelpiel & Dinkelpiel
Attorneys at Law
333 Montgomery Street
San Francisco
California

an answer to the complaint which is herewith served
upon you, within 20 days after service of this sum-
mons upon you, exclusive of the day of service. If
you fail to do so, judgment by default will be taken

against you for the relief demanded in the complaint.

[Seal]

WALTER B. MALING

Clerk of Court.

By B. E. O'HARA

Deputy Clerk.

Date: January 16, 1939.

Note.—This summons is issued pursuant to Rule 4 of the Federal Rules of Civil Procedure.

[Endorsed]: Filed Apr. 14, 1939. [39]

[Title of District Court and Cause.]

MOTION FOR ORDER FOR PUBLICATION
OF SUMMONS UPON DEFENDANT
GRACE APPLETON McKEY.

Now come the plaintiffs in the above-entitled suit, by their attorneys, Messrs. Dinkelspiel & Dinkelspiel, and move the Court that an order be made and granted in said cause that service of summons on defendant Grace Appleton McKey be made by publication, and that by its order the Court or Judge designate "The Los Angeles Daily Journal" as the newspaper most likely to give notice to said defendant, and direct that publication of the aforesaid summons be made in said newspaper once each calendar week for two months; and for such other further, and/or different [40] relief as may be meet and proper in the premises.

Said motion will be made upon the ground that defendant Grace Appleton McKey cannot, after due diligence, be found within the State of California or within the jurisdiction of this Court, and on the ground that said defendant has been and now is concealing herself to avoid the service of summons and/or other process in this action; that a cause of action exists against said defendant in favor of plaintiffs, and that she is a necessary and proper party to the above-entitled suit; and that service of summons by publication as herein requested is the manner prescribed by the law of the State of California, which is the State in which the service is to be made, for the service of summons in an action brought in the courts of general jurisdiction of that State, in cases of this sort.

This motion is based upon this writing, upon the verified complaint on file herein, upon the affidavit of Fred S. Herrington being filed and presented herewith, upon the records of the above-entitled cause, and upon such other evidence and proof as may be adduced or offered upon the hearing of this motion.

Dated, January 16th, 1939.

DINKELSPIEL & DINKELSPIEL
Attorneys for Plaintiffs.

[Endorsed]: Filed Jan. 16, 1939. [41]

[Title of District Court and Cause.]

AFFIDAVIT FOR ORDER FOR PUBLICA-
TION OF SUMMONS

State of California,
City and County of San Francisco—ss.

Fred S. Herrington, being first duly sworn, de-
poses and says:

That he at all times herein mentioned has been
and now is an attorney at law, and has been and is
associated with the law firm of Dinkelpiel & Dink-
elpiel, attorneys for plaintiffs in the above en-
titled stockholders' liability suit; and that he makes
this affidavit for and on behalf of said plaintiffs,
for the reason that said plaintiffs reside outside the
state of [42] California, and for the further reason
that the facts herein stated are within affiant's
knowledge, affiant having been attending to the legal
and other matters pertaining to said suit for and on
behalf of said firm.

That the verified complaint in the above-entitled
suit was filed with the Clerk of the above-entitled
Court on the 19th day of November, 1936, and sub-
poena ad respondendum was thereupon issued there-
on directly to each and all of the defendants named
in said action, including defendant Grace Appleton
McKey.

That as is more particularly set forth in the said
complaint, to which reference is hereby made, said
action is one to recover the statutory stockholders'
liabilities of defendants as stockholders of the now
insolvent Woodlawn Trust and Savings Bank of

Chicago, Illinois; that defendant Grace Appleton McKey held 307 shares of stock in said bank; and shortly before said suit was commenced affiant was advised by the Chicago attorneys representing the receiver for said bank, that the books and records of the Bank showed that Grace Appleton McKey resided at 1550 North Fairfax Avenue, Hollywood, California; that upon issuance of said subpoena, and on November 27, 1936, affiant mailed the original subpoena together with copy thereof and copy of the complaint in said action to Robert E. Clark, the United States Marshal at Los Angeles, California, with written instructions to serve the same upon said defendant Grace Appleton McKey at the address aforesaid; that thereafter, on or about December 16, 1936, said Marshal wrote plaintiffs' said attorneys that he could not find defendant Grace Appleton McKey, hereinafter referred to as "said defendant", at the above address but that he had ascertained that she received her mail at 119 Twenty-fourth Street, Hermosa Beach, California, at which last mentioned address another of the [43] defendants, namely, Kathryn Riddell resided; and that on attempting to serve said defendant at said last address he was advised that she was not there and he could not ascertain exactly where she was supposed to be; said Marshal in said letter suggested leaving the subpoena with said Kathryn Riddell as and for service on said defendant.

That when said suit was filed plaintiffs' said attorneys employed a private investigator of Los Angeles, namely, Leo K. Gold, Esq., who is an attorney

at law, to verify the addresses of the various defendants in said action, many of whom resided in or about Los Angeles, and also to determine as much information as possible regarding the financial status and condition of said defendants, including defendant Grace Appleton McKey; that on or about December 14, 1936, affiant was advised by said investigator that said defendant had moved from No. 1550 North Fairfax Avenue, Hollywood, to 116 South Clybourne Street, Burbank, California; and affiant immediately, on said date, wrote said Marshal advising him of the change of address, and requesting that attempt be made to serve said defendant thereat; that said investigator also reported to affiant that said defendant was a housewife residing at said Burbank address.

That on December 21, 1936, affiant wrote said Marshal giving him the foregoing information and again requesting that an attempt be made to serve said defendant thereat.

That at said time said investigator also reported to affiant that said defendant had been sued as a defendant in a Superior Court action in Los Angeles and had apparently been served in said action and had appeared therein and had obtained a dismissal with prejudice dismissing said action as of July 2, 1935. [44]

That on or about January 27, 1937, said Marshal wrote affiant that he had made several attempts, by three different Deputy Marshals, to serve said defendant at 111 and 116 South Clybourne Street, Burbank, California, and also at 119 Twenty-fourth

Street, Hermosa Beach, California, and also at 1550 Fairfax Avenue, Hollywood, California and that persons at these premises always advised that the defendant did not reside there or was away and refused further information concerning her whereabouts; said Marshal also stated that he was attempting to serve said defendant in another action for some Los Angeles attorneys.

That affiant has been informed by said investigator employed as aforesaid, and believes and therefore alleges, that defendant Grace Appleton McKey and defendant Kathryn Riddell are sisters-in-law; that said Marshal served defendant Kathryn Riddell with subpoena in this action on December 11, 1936, at the aforesaid Hermosa Ceach address; that affiant is informed and believes and therefore alleges the fact to be that defendant Grace Appleton McKey learned of the pendency of this suit through her said sister-in-law, and anticipating that she would be served as a defendant therein at all times has been and now is attempting to evade service of subpoena and has been and now is concealing herself to avoid service of subpoena and/or other process in said action.

That thereafter, on or about February 1, 1937, affiant wrote said Marshal to make further attempts to serve said defendant with said subpoena; and on February 26, 1937, said Marshal wrote plaintiffs' said attorneys advising that he had not yet been able to effect service on said defendant, but that he had "definitely established that she is residing at the ad- [45] dress known as 119 Twenty-fourth

Street, Hermosa Beach", and that it had just been within a few days prior to that date that she had established said fact and that his deputy had made three different trips, two in the morning, and one late at night but that no one responded or answered the door on the calls; that thereafter, on March 5, 1937, said Marshal wrote said attorneys that his efforts to serve said defendant had been unsuccessful and he believed it advisable to return the subpoena to the Clerk with an affidavit showing his inability to serve said defendant; and said Marshal suggested that the Court appoint a private person in Los Angeles to make the service, and said Marshal suggested and recommended that said Leo K. Gold, the investigator, be designated for that purpose inasmuch as he had co-operated with the Marshal's office and assisted the Marshal in many ways in locating the various defendants in this action.

That the original subpoena was returned to and filed with the Clerk at or about said last mentioned time, and reference is hereby made to the same for further particulars and to the Marshal's return affixed thereto.

That thereafter, on March 15, 1937, on motion of plaintiffs, an order was duly made in the above-entitled court by the Honorable A. F. St. Sure, United States District Judge, designating and appointing said Leo K. Gold, of Los Angeles, as the person to serve said subpoena ad respondendum as well as any alias or other subpoena on said defendant; that said order was filed with the Clerk on said

date, and reference to the same is hereby made for further particulars.

That inasmuch as the original subpoena had been returned and filed as aforesaid, an alias subpoena was duly issued by the Clerk in the above-entitled matter, at the request of [46] plaintiffs, on March 15, 1937, directed to the said defendants.

That thereafter, on March 16, 1937, said alias subpoena, together with copies thereof and copies of the complaint, were mailed to said Leo K. Gold at Los Angeles with instructions to serve same on said defendant either personally or by leaving a copy of the subpoena and complaint with said Kathryn Riddell with whom and at whose dwelling house said defendant was supposed to reside, all in accordance with Equity Rule No. 13, as it then read.

That under date of April 1, 1937, said Leo K. Gold acknowledged receipt of said alias subpoena and reported to affiant that he was endeavoring to serve the same on said defendant at the various addresses hereinabove set forth. He also reported that he had interviewed Mr. Marvin Wick, the postmaster at Hermosa Beach who had advised him that Kathryn Riddell received mail at the Hermosa Beach Post Office; and further that an examination of the registry of voters at Hermosa Beach, disclosed that said Kathryn Riddell was a registered voter at that place. He further reported that he was reasonably certain that said defendant was residing with said Kathryn Riddell, and that inquiries made at Hermosa Beach indicated that Kathryn Riddell and said defendant were then residing,

temporarily at least, at 1550 Fairfax Avenue, Hollywood. He stated that on March 31, 1937, he called at said last mentioned address in the evening and observed lights burning inside the house, and rang the doorbell but was unable to get any response thereto.

That on April 5, 1937, said Leo K. Gold wrote affiant advising that he had made further attempts to serve defendant and also to contact said Kathryn Riddell, at the aforesaid Fairfax Avenue address, without success, but that inquiries made by him [47] from other persons in the neighborhood of said address indicated that said defendant did live there, and further established that Kathryn Riddell and said defendant were related, either as sisters or sisters-in-law.

That on April 27, 1937, said Leo K. Gold wrote affiant advising that he had recently made a call at the aforesaid Hermosa Beach address and spoke to a woman who presumably lived there who stated to him that she was renting the place as a tenant, from said defendant McKey. He also reported at said time that he had made two additional trips to the Fairfax Avenue address without finding said defendant at home.

That on June 25, 1937, said Leo K. Gold again wrote affiant reporting that on June 15, 1937, he had again visited the Fairfax Avenue address and had found no one at home although he waited three hours in the vicinity in anticipation of someone returning home. He also advised there was no telephone listed at said address and that further in-

quiries amongst the neighbors disclosed no additional information concerning the defendant. He further advised that he had examined the Los Angeles City Directories for a number of years back and found that same listed Grace Appleton McKey as residing at 1550 Fairfax Avenue, Hollywood. He further reported that he had talked with a member of the firm of attorneys who had represented said Grace Appleton McKey in the Superior Court action hereinabove mentioned, but said attorneys advised they had not seen or heard from said defendant since said action was dismissed, and said attorneys advise him that the last address they had for her was the aforesaid address in Burbank, California.

That on September 14, 1937, said Leo K. Gold wrote affiant that he was still continuing his efforts to serve said [48] alias subpoena on the said defendant and also to locate said Kathryn Riddell with whom said defendant was supposed to be living. He stated that further investigation then indicated with reasonable certainty that said parties were then residing at the address 116 South Clybourne Street, Burbank, California, and that an attempt on his part to obtain the telephone number at said address disclosed that it was a confidential unlisted number.

That on September 24, 1937, said Leo K. Gold again wrote affiant that he had called at the Hermosa Beach address and found the same locked up and had waited around the vicinity for about two hours without anyone appearing at the address. He also reported that inquiries made at the

tax collector's office disclosed that said Kathryn Riddell had instructed the tax collector to send her the tax bills on the Hermosa Beach property and also on the Burbank property, although said properties were recorded in the name of an Elizabeth Gordon. Said investigator stated that he believed the name Elizabeth Gordon to be an alias name used by said Kathryn Riddell as a cover-up.

That on November 6, 1937, said Leo K. Gold again wrote affiant reporting that during the previous week he had called at the Burbank address aforesaid but was unable to find anyone at home there or at least that no one answered the doorbell. He further stated that the U. S. Marshal at Los Angeles had recently telephoned him stating he desired the assistance of said investigator in locating Kathryn Riddell for purpose of enabling the Marshal to serve her in another action pending in the District Court in Los Angeles, for some other attorneys.

That on November 19, 1937, said Leo K. Gold again wrote affiant reporting that inquiry made at the post office at Hermosa Beach disclosed that Kathryn Riddell maintained a post [49] office box at said post office and received mail there. He also stated that he had made several additional attempts to locate said defendant and said Kathryn Riddell at the Burbank address aforesaid, to serve said defendant, without success, and that on one occasion while he was waiting in the vicinity of said premises in the evening he had to explain his presence to the local police. He also reported that he

had consulted the latest tax records at Burbank and found therefrom that the said Burbank premises, at 116 Clybourne Street, were assessed to said Kathryn Riddell.

That in or about December, 1937, affiant learned that the law firm of Meserve, Mumper, Hughes and Robertson with offices at 555 South Flower Street, Los Angeles, were attorneys for certain plaintiffs in a suit then pending in the United States District Court at Los Angeles in which Grace Appleton McKey was a defendant, and that said attorneys were endeavoring to effect service of process in said action upon said defendant; that affiant wrote said firm to inquire concerning the same, and in reply received a letter dated December 11, 1937, from said attorneys saying that they had made numerous attempts to effect service of process on said defendant, unsuccessfully; that a Deputy United States Marshal had made several trips to the aforesaid Hermosa Beach address and also to the aforesaid Burbank address without successfully contacting or serving said defendant; and also that they had sent out their office clerks on a number of different occasions to said addresses to locate said defendant. Said attorneys promised to advise affiant if and when they were successful in serving or locating said defendant, but affiant has heard nothing further from them in that connection.

That on January 11, 1938, said Leo K. Gold wrote affiant saying that he had recently learned that Kathryn Riddell was [50] the reputed owner of

premises located at 1257 North Formosa Street, Los Angeles, and that he had called at this address and spoke with a person presumably residing there who stated his name was Max Zifkin and who further stated to said investigator that he rented said property from Mrs. Kathryn Riddell who resided at Hermosa Beach and that he periodically sent the rent checks to said Riddell.

That on or about August 2, 1938, affiant wrote said Leo K. Gold and suggested that to assist in locating the defendant he call at the law office of Meserve, Mumper, Hughes and Robertson in Los Angeles to inquire of said attorneys if they had had any better success in locating or serving said defendant in the action they were handling as aforesaid; that in response to said letter, said Leo K. Gold wrote affiant on August 19, 1938, saying that he had called on said attorneys as requested by affiant but that they were still trying to locate and serve said defendant. In said letter, said investigator further reported that he had completely recovered the ground covered during the past year in attempting to locate said defendant and also said Kathryn Riddell and had called at the various addresses aforesaid and had also searched and rechecked the city and telephone directories and the newly compiled voters' register without finding any additional or other clues as to the whereabouts of said parties or without locating said parties themselves or either of them.

That in view of the foregoing affiant and plaintiffs' attorneys have decided it would be futile to

spend further time, effort and money in an attempt to effect personal service of process on said defendant; that said defendant, Grace Appleton McKey, cannot, after due diligence, be found within the State of California, and cannot be personally served with subpoena or other pro- [51] cess in this suit; that affiant is informed and believes and therefore alleges the fact to be that said defendant at all times since the commencement of this action has been and now is concealing herself to avoid the service of subpoena and other process herein, and that she will continue to so conceal herself for the purpose aforesaid; that affiant and said attorneys have made a diligent search for said defendant and have made inquiries of each and every person whom they could expect, or had any reason to believe they would receive, information as to the whereabouts of said defendant; that affiant and said attorneys do not know the present whereabouts of said defendant and cannot learn her present whereabouts, excepting that they are informed and believe and therefore allege the fact to be that she is residing somewhere within the State of California and within the jurisdiction of this court.

That affiant is informed and believes and therefore alleges the fact to be that there has not been filed by said defendant or on her behalf, in the City and County of San Francisco, State of California, where said action was brought and is pending, a certificate of residence as provided by section 1163 of the Civil Code of California.

That the "The Los Angeles Daily Journal" is a newspaper of general circulation, published daily, except Sundays, in the County of Los Angeles, State of California; that a publication of said subpoena ad respondendum or a summons in said newspaper is most likely to give notice to said defendant.

That sections 412 and 413 of the California Code of Civil Procedure provide that where a person on whom service is to be made cannot, after due diligence, be found within the State of California, or conceals himself or herself to avoid the service [52] vice of summons, a court or a judge or a justice in any court of general jurisdiction in California may make an order that service of such process on such defendant be made by the publication of the summons; and that the order must direct the publication to be made in a newspaper to be named and designated as most likely to give notice to the person to be served and for such length of time as may be deemed reasonable, at least once each calendar week.

That this suit was and is brought to recover the sum of \$81,978.93 from defendant Grace Appleton McKey which said sum was and is due and owing from her to the plaintiffs and other creditors of said Woodlawn Trust and Savings Bank, upon her statutory liability as a stockholder of said bank; that the cause of action against said defendant is more particularly set forth in plaintiffs' verified complaint on file herein to which reference is hereby made for further particulars and which, by this

reference, is hereby made a part hereof; that a cause of action at all times has existed and now exists against defendant Grace Appleton McKey, which said cause of action is particularly set forth in plaintiffs' verified complaint on file herein to which reference is hereby made for further particulars and which, by this reference, is hereby made a part hereof; that said defendant is a necessary and proper party to the above-entitled suit.

Wherefore, affiant, on behalf of said plaintiffs and on behalf of the said attorneys for plaintiffs, prays that this Court make its order directing that service of said summons on defendant, Grace Appleton McKey, be made by publication, and that by its order the Court designate said "The Los Angeles Daily Journal" as the newspaper most likely to give notice to said defendant, and direct that publication of the aforesaid [53] summons be made in said newspaper once each calendar week for two months.

FRED S. HERRINGTON.

Subscribed and sworn to before me this 14th day of January, 1939.

[Seal] MARK E. LEVY,
Notary Public in and for the City and County of
San Francisco, State of California.

[Endorsed]: Filed Jan. 16, 1939. [54]

[Title of District Court and Cause.]

ORDER FOR PUBLICATION OF SUMMONS

Upon the motion of plaintiffs in the above-entitled suit, by Messrs. Dinkelspiel & Dinkelspiel, attorneys for said plaintiffs, and it appearing to the satisfaction of the Judge from the affidavit of Fred S. Herrington, filed herein this day, and from the verified complaint on file in this suit, that a cause of action exists against the defendants herein, including defendant Grace Appleton McKey, and in favor of the plaintiffs;

And it further appearing to the satisfaction of the Judge from said affidavit and from other evidence, and the Court finds, that a subpoena ad respondendum, and also an alias subpoena [55] ad respondendum, has been duly issued out of this Court in this cause, and that a summons has also been issued out of this Court in this cause, and that diligent search has been made for said defendant Grace Appleton McKey in the State of California and within the jurisdiction of this Court in order to serve said subpoena and said alias subpoena upon her, and that the said defendant cannot, after due diligence, be found within the State of California or the jurisdiction of this Court, and that said defendant has been and now is concealing herself to avoid the service of said process; that personal service of summons or other process cannot be made upon said defendant, and that summons in this suit should be served by publication;

And it further appearing that there has not been

filed on behalf of said defendant in the City and County of San Francisco, State of California, or elsewhere within the jurisdiction of this Court, where said action was brought and is pending, the certificate of residence provided for in Section 1163 of the Civil Code of the State of California; that "The Los Angeles Daily Journal" is a newspaper of general circulation, published daily, except Sundays, in the County of Los Angeles, State of California, and is the newspaper most likely to give notice of this suit to said defendant; and good cause appearing therefor:

It Is Hereby Ordered, Adjudged and Decreed, that service of the summons upon said defendant in this action be made by publication of said summons in said "The Los Angeles Daily Journal", which said newspaper is hereby designated as most likely to give notice to said defendant, Grace Appleton McKey, and that said publication be made once each calendar week for two months. Done in Open Court, this 16th of January, 1939.

MICHAEL J. ROCHE,
United States District Judge.

[Endorsed]: Filed Jan. 16, 1939. [56]

[Title of District Court and Cause.]

AFFIDAVIT OF PUBLICATION
OF SUMMONS

State of California

County of Los Angeles—ss.

G. Artz, of said County and State, being duly sworn, says:

That I am and at all times herein mentioned was a citizen of the United States, over eighteen years of age, and not a party nor interested in the above entitled matter; that I am the principal clerk of the printer, publisher and proprietor of The Los Angeles Daily Journal, a newspaper printed and published daily (Sundays excepted), in the said Los Angeles County; that the Summons in the above entitled matter, of which the annexed is a printed copy, was published in said newspaper at least once a week for two months—January 24, and 31st, February 7, 14, 21, and 28th, March 7, 14, 21, and 28th, All in 1939.

G. ARTZ

Subscribed and sworn to before me, this 28th day of March, 1939.

[Seal] WM. W. ROE
Notary Public in and for Los Angeles County,
State of California.

SUMMONS

Civil Action File No. 4103 R In Equity

District Court of the United States, for the Northern District of California, Southern Division.

James W. Butler; Mary L. Butler; Mary Seguin; Clara Verschoor; Lillian Fitzgerald; David J. Lewis; Elizabeth A. Lewis; John Lingie Smith; Ella Ruth Smith; Patrick J. Leonard; Annie Leonard; Stephen C. Perry; Carle Hillebrand; Mrs. C. C. E. Hillebrand; Fred Hussey; Mrs. H. L. Gooch; Oscar Swanson; Marvin Walter Wafer; George W. Irvine; Betty Du Bois; Mrs. I. B. Brawley; Margaret Johnstone; James J. Phelan; J. H. Pegram; Mrs. J. H. Pegram; Marie C. Knief; Amos Washington; Dorothy Lewitz; Marie C. Cross; Violette M. Cross; Charles L. Forsberg; and Madge McNaul, Plaintiffs, vs. Charles M. Pusey; Siegfried Schulein, Junior; Siegfried Schulein; William Forsstrom; Grace Appleton McKey; E. E. Fricke; Erma A. La Noue; Mark M. Baker; Erma M. Aszman; Leone B. Hill; Mrs. L. E. Hill; and Kathryn Riddell, Defendants.

To the above named Defendant: Grace Appleton McKey.

You are hereby summoned and required to serve upon Dinkelspiel & Dinkelspiel, plaintiff's attorney, whose address is: Dinkelspiel & Dinkelspiel, Attorneys at Law, 333 Montgomery Street, San Francisco, California, an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

Date: January 16, 1939.

[Seal] WALTER B. MALING,
 Clerk of the Court.

By B. E. O'HARA,
 Deputy Clerk.

First publication January 24, 1939.
 (772 Tues)

Reprint L. A. Daily Journal MU. 6354

[Endorsed]: Filed Apr. 14, 1939.

[Title of District Court and Cause.]

PRAECIPE

To the Clerk of Said Court:

Sir: Please enter default for failure to plead, answer or otherwise defend against defendant Grace Appleton McKey; and thereupon please enter judgment by default in favor of plaintiffs and against defendant Grace Appleton McKey for \$110,886.63, with costs in the sum of \$43.50.

Dated: April 18, 1939.

(sgd) DINKELSPIEL &
 DINKELSPIEL
 Attorneys for Plaintiffs
 per FRED S. HERRINGTON

[Endorsed]: Filed Apr. 18, 1939. [58]

[Title of District Court and Cause.]

AFFIDAVIT OF DEFAULT JUDGMENT

United States of America,
State of California,
City and County of San Francisco.—ss.

Fred S. Herrington, being first duly sworn, deposes and says:

That he is an attorney at law, duly entitled to practice in the above-entitled Court, and has been and now is associated with the law firm of Dinkelspiel & Dinkelspiel, attorneys for plaintiffs; that he makes this affidavit for and on behalf of said plaintiffs, and for the reason that the facts herein stated are within his knowledge or that he is familiar with said facts on account of his having handled this action. [59]

That on January 16, 1939, an order was made in the above-entitled action by the above-entitled court for the publication of summons against defendant Grace Appleton McKey; that thereafter, summons issued in said action on said last mentioned date was duly published in accordance with said order in the Los Angeles Daily Journal, for the period and in the manner required by said order; that service of said summons, by publication as aforesaid, was completed on defendant Grace Appleton McKey on March 28, 1939; that in accordance with the Rules of this Court and in accordance with said summons, said defendant had twenty days thereafter within which to plead or otherwise defend; that more than twenty days have elapsed since sum-

mons was served on said defendant as aforesaid, and said defendant has wholly failed, neglected and refused to plead or otherwise defend to the complaint of plaintiffs, and on that account, this is a proper case for the entry of a default against said defendant and for the entry of a default judgment against her as prayed for in said complaint.

That there is due, owing and unpaid from defendant Grace Appleton McKey to plaintiffs in this action, the sum of \$75,305.01 principal, together with interest thereon at 7 per cent per annum from the 23rd day of June, 1932, which said interest amounts to in excess of \$35,581.62, or a total amount due including principal and interest of \$110,886.63, together with plaintiffs' costs amounting to the sum of \$43.50, including cost of publication of summons which amounted to \$22.50, filing fee of \$15.00 and fees and expenses of U. S. Marshall at Los Angeles incurred in endeavoring to locate and serve said defendant amounting to \$6.00.

Wherefore, plaintiffs by affiant, respectfully request [60] that the Clerk of the above-entitled Court enter the default of said defendant and thereupon enter a default judgment in the amount aforesaid against said defendant.

FRED S. HERRINGTON

Subscribed and sworn to before me this 18th day of April, 1939.

[Seal] LOUIS WIENER

Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed Apr. 18, 1939. [61]

[Title of District Court and Cause.]

JUDGMENT BY DEFAULT OF CLERK

The defendant Grace Appleton McKey sued herein upon her statutory liability as a stockholder in Woodlawn Trust & Savings Bank, an Illinois banking corporation, having been duly and regularly served with summons and having failed to appear, plead or otherwise defend against the complaint of plaintiffs on file herein within the time allowed by law and the said summons, which time has not been enlarged; and the default of aid defendant having [62] been duly entered; upon application of plaintiff to the Clerk for judgment, and upon affidavit filed showing the amount due.

It Is Adjudged that plaintiffs above named have and recover from defendant Grace Appleton McKey the sum of \$75,305.01 principal, \$35,581.62 interest, or a total of \$110,886.63, together with costs in the sum of \$43.50.

Judgment entered April 18, 1939.

WALTER B. MALING,
Clerk of Court.

[Endorsed]: Filed Apr. 18, 1939. [63]

[Title of District Court and Cause.]

FINAL DECREE PRO CONFESSO.

Upon the motion and application of Messrs. Dinkelspiel & Dinkelspiel, attorneys for plaintiffs in the above-entitled suit; and it appearing to the

satisfaction of the Court, and the Court finds: That defendant Kathryn Riddell was duly and regularly and personally served with a subpoena ad respondendum, issued in said cause, on the 11th day of December, 1936, at the City of Hermosa Beach, State of California, as more fully appears from the return of said service made by the United States Marshal for the Southern District of California and attached to said subpoena on file with the Clerk of this Court in said cause; that said defendant has failed to answer the bill of complaint exhibited against her in said suit and has otherwise failed to appear herein within the time required by law and the said subpoena, which time has not been enlarged; that plaintiffs have heretofore elected to take an order as of course that said bill of complaint be [64] taken pro confesso against said defendant, which said order was duly made and entered in said cause on the 7th day of January, 1937; that said defendant's time to answer to said bill had expired prior to the aforesaid election of plaintiffs' and the said making and entering of said order; that plaintiffs are entitled to a decree pro confesso, absolute and final against the said defendant Kathryn Riddell; and good cause appearing therefor:

It Is Hereby Ordered, Adjudged and Decreed that plaintiffs do have and recover from the said defendant Kathryn Riddell, the sum of \$400.00 principal, together with interest thereon at the rate of 7% per annum from the 23rd day of June, 1932, in the sum of \$126.00 and together with plaintiffs'

costs of suit herein incurred amounting to the sum of \$18.88.

Dated: San Francisco, California this 30th day of March, 1937.

MICHAEL J. ROCHE

United States District Judge.

[Endorsed]: Filed Mar. 30, 1937. [65]

[Title of District Court and Cause.]

NOTICE OF MOTION
AFFIDAVIT
MEMO OF AUTHORITIES

Defendant above named, Grace Appleton McKey, appearing specially and for the purpose of this motion only, moves the court as follows:

1. To dismiss the action as to this moving defendant on the ground that it is in the wrong district, in that this moving defendant is not now and never has been an inhabitant of this district, all of which more clearly appears from the affidavit of this moving defendant, which is attached hereto as Exhibit "A".

2. To quash the service of summons upon her on the grounds:

(a) that this court having no jurisdiction over this cause as against this moving defendant, it had no jurisdiction to order or approve service of subpoena [66] or summons outside this district, which purported service as appears

from the Order of Publication issued out of this Court, was made by publication in a legal newspaper in Los Angeles, California, in the District of which this moving defendant is an inhabitant.

(b) that the order of this court directing publication of summons against this moving defendant does not comply with Section 412 of the Code of Civil Procedure of the State of California, in that the alleged facts in the affidavit of Fred S. Herrington upon which the order is based, are predicated not upon the affiant's knowledge but upon hearsay.

(c) that the order of this court directing publication of summons against this moving defendant fails to direct the depositing in the post office of a copy of the summons and complaint, directed to her at her place of residence, although as appears from the said affidavit of Fred S. Herrington, her place of residence was known.

3. To dismiss the action as to this moving defendant on the grounds:

(a) that the action is barred, as to her, by the statute of limitations applicable, to-wit: Section 337 or Section 338 of the Code of Civil Procedure of the State of California, in that it appears from the complaint that more than four (4) years elapsed between the accrual of the alleged liability and the filing of this action.

(b) that this court has no jurisdiction over the cause or causes set out in the bill of com-

plaint, in that as alleged the matter in controversy does not [67] in any cause of action alleged herein, exceed the sum of \$3000.00.

SULLIVAN, ROCHE &
JOHNSON

Attorneys for Defendant
Grace Appleton McKey
Mills Tower, San Francisco [68]

NOTICE OF MOTION

To Dinkelspiel & Dinkelspiel,
Attorneys for Plaintiff:

Please Take Notice, that the undersigned will bring the above motion on for hearing before this Court in the Court Room of Honorable Michael J. Roche, in the United States Courts and Post Office Building, San Francisco, California, on the 17th day of August, 1942, at ten o'clock a. m., or as soon thereafter as counsel may be heard.

Upon said hearing the undersigned will rely upon the files of this Court in this action, including the affidavit of Fred S. Herrington for an Order of Publication of Summons, the Order for Publication of Summons on Grace Appleton McKey, and upon the Affidavit of Grace Appleton McKey attached hereto.

SULLIVAN, ROCHE &
JOHNSON
Attorneys for defendant
Grace Appleton McKey
Mills Tower, San Francisco [69]

MEMO OF AUTHORITIES IN SUPPORT OF MOTION

Suit must be brought in District
of defendant's residence:

Judicial Code, Section 51, amended (28
U.S.C.A. 112)

"Civil suits; arrests in; district where brought; effective period. (a) Except as provided in sections 113 to 117 of this title * * * no civil suit shall be brought in any district court against any persons by any original process or proceeding in any other district than that whereof he is an inhabitant; but where the jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought only in the district of the residence of either the plaintiff or the defendant."

Judicial Code, Section 52, providing that where there are more than one defendant to a suit and defendants reside in different districts in the same state, the suit may be brought in either district—applies only to single suits involving several defendants with joint liability, and not to actions in which suits affecting individual liability of defendants are consolidated for sake of convenience. In such a case the cause of action against each defendant is considered a separate "suit."

Schwed v. Smith, 1906 U. S. 188; 27 L. Ed. 156;

Rich v. Lambert, 53 U. S. 347; 13 L. Ed. 346;
Broderick v. Amer. Gen. Corp., 71 F. (2d) 864;
Derby v. Stevens, 64 Cal. 287;
Heavlin v. Westchester Fire Ins. Co., 12 Cal. App. (2d) 695.

Service not sufficient if court lacks jurisdiction:

Where suit is filed in the wrong district, service of summons therein does not give the court jurisdiction even though service is made in the state as provided in Rule 4 (f) [70] of Rules of Civil Procedure. That rule applies only where the court has jurisdiction.

Rule 82—Rules of Civil Procedure;
Melekov v. Collins, 30 Fed. Suppl. 159, (Judge McCormick)
Carby v. Greco, 31 Fed. Suppl. 251 (Ky. 1940).

Affidavit of Herrington for Publication of Summons Insufficient:

The facts permitting service by publication must be proved by affidavit.

Section 412, Code of Civil Procedure, California.

The affiant must have personal knowledge of the facts and cannot supply them by information and belief. An order based upon an information and belief affidavit is void.

In re Behymer, 130 Cal. App. 20;
Gay v. Torrance, 145 Cal. 144;
Kahn v. Mathai, 115 Cal. 689.

Such statutes must be strictly construed because they are in derogation of the common law.

Rickelson v. Richardson, 26 Cal. 149, 152;
Col. Screw Co. v. Warner Lock Co., 138
Cal. 445;
Braley v. Seaman, 30 Cal. 610, 616;
Gage v. Riverside, 156 Fed. 1002, 1004,
(Judge Welborn).

Order of Publication

Insufficient:

The Order of Publication must direct service by mail as well as publication, where defendant's residence is known, or no jurisdiction will be obtained over defendant.

Section 413, Code of Civil Procedure,
California;

Rickelson v. Richardson, 26 Cal. 149. [71]

Court lacks jurisdiction because amount involved below jurisdictional amount:

The liability of an Illinois bank stockholder to a creditor of the bank is individual.

In re Cohn's Estate, 269 N. Y. S. 235;

Eames v. Davis, 102 Ill. 350;

Golden v. Cervenka, 278 Ill. 409; 116 N. E. 273;

Babka Plastering Co. v. Chicago Bank,
264 Ill. App. 142.

The amount of individual claims of creditors against stockholders cannot be aggregated to give jurisdiction to a Federal District Court.

Broderick v. Amer. Gen. Corp. 71 Fed. (2d) 864, (4th C.C.A. 1934)

Eberhard v. Northwestern Mutual, 241 Fed. 353, (6th C. C. A.)

Appl. of Hardware Co. of Minnesota, 91 Fed. (2d) 13, (Judge Welborn)

So. Pac. v. McAdoo, 82 Fed. (2d) 121 (9th C. C. A.);

Scott v. Frazier, 253 U. S. 242; 64 L. Ed. 883, 886;

Helliker v. Grand Lodge, 112 Fed. (2d) 382 (6th C. C. A.)

Independence Corp. v. Deckert, 108 Fed. (2d) 51, (3rd C. C. A.)

Hackerer v. Guaranty Trust, 117 Fed. (2d) 95, (2nd C. C. A.)

California cases to same effect:

Johnson v. Hinkel, 29 Cal. App. 78, 87;

Meyers v. Sierra Valley Assn. 122 Cal. 669;

Emery v. Pac. 8 Cal. (2d) 663, 667;

Derby v. Stevens, 64 Cal. 287, 289.

SULLIVAN, ROCHE &
JOHNSON

Attorneys for Defendant. [72]

[Title of District Court and Cause.]

AFFIDAVIT OF GRACE APPLETON McKEY

United States of America
Northern District of California
Southern Division.—ss.

Grace Appleton McKey, being first duly sworn, deposes and says:

I am one of the defendants in the above entitled cause:

From the year 1921 to this date, I have been a resident of Los Angeles County, State of California, and have not, during any of said period resided at any place within the confines of the Northern Judicial District of California.

I have never been served with any papers in the above entitled cause, and the first knowledge I had that a judgment had been taken against me was on or about the 15th day of June, 1942.

During all of the years of residence in California, I never concealed my [73] identity from anyone. During the period from Nov. 19, 1939 to the date of the entry of said judgment I resided either at 1550 North Fairfax Avenue, Los Angeles, or at 116 South Clybourne Street, Burbank, California. During that period I was, except for occasional visits to relatives, at home most of the time. While I was at home, at either of said residences, I never refused to answer the door when anyone called. I am at present visiting in Michigan, but my home is still in Southern California.

I have fully and fairly stated the case and all of

the facts in this cause to James Farraher, an associate of the firm of Sullivan, Roche & Johnson, one of my counsel and attorneys in this case, who resides in the City and County of San Francisco, State of California, and, after such statement, I am advised by the said attorney and verily believe that I have a good and substantial defense on the merits of this cause, and to all of the purported causes of action set forth in the Bill of Complaint, and I have been further advised by said attorney that the said cause, as to me, was barred by the Statute of Limitations of the State of California, and by laches, prior to the filing of this action.

This affidavit is made in support of my motion filed herewith, to set aside as void the judgment rendered against me in the above entitled cause, the publication of summons against me in said cause, and the order for said publication of summons.

GRACE APPLETON McKEY

Subscribed and sworn to before me this 18th day of July, 1942.

[Seal]

STANLEY C. BOROWSKI

Clerk of the United States

District Court, For the West
District of Michigan.

[Endorsed]: Filed Jul. 23, 1942. [74]

[Title of District Court and Cause.]

NOTICE OF MOTION

To Grace Appleton McKey, one of the defendants herein and to Sullivan, Roche & Johnson, Attorneys for said defendant:

Please Take Notice, that the undersigned will bring the following motion on for hearing before this court in the court-room of Honorable Michael J. Roche, in the United States Courts and Post Office Building, 7th and Mission Streets, in San Francisco, California, on the 17th day of August, 1942, at the hour of 10 o'clock in the forenoon of said day, or as soon thereafter as counsel can be heard.

Plaintiffs move the court as follows:

To allow plaintiffs to file the attached affidavits of Leo K. Gold of Los Angeles, California, dated the 6th day of [75] August, 1942, and verified August 7, 1942, and the affidavit of James P. Lavelle, Deputy Marshal of the United States District Court for the Southern District of California, Central Division dated August 7, 1942 and verified the same day. Both affidavits to be filed as further evidence to show that at the time of the filing of plaintiffs' motion for an order of publication of summons herein, to wit, January 16, 1939, and at the time of the making of said Order of publication of January 16, 1939, all requirements prescribed by law for the Order of Publication of Summons were present and complied with.

Dated: August 10th, 1942.

DINKELSPIEL & DINKELSPIEL,
Attorneys for Plaintiffs.

POINTS AND AUTHORITIES.

Rule IV (h) of the rules of Civil Procedure for
the District Court of the United States:

City of Salinas v. Luke Kow Lee, 217 Cal.
252;

Bley v. Dessin, 31 Cal. App. (2d) 338;

Re Spiers 32 Cal. App. (2d) 124;

Alpha Stores Ltd. v. You Bet Min. Co.
18 Cal. App. (2d) 252;

Herman v. Santee, 103 Cal. 519.

Receipt of a copy of the within Notice of Motion
is hereby acknowledged this 10th day of August, 1942.

SULLIVAN, ROCHE &
JOHNSON

Attorneys for Defendant

Grace Appleton McKey. [76]

[Title of District Court and Cause.]

AFFIDAVIT OF LEO K. GOLD

State of California

County of Los Angeles—ss.

Leo K. Gold, being first duly sworn, deposes and says:

That he is an attorney at law duly admitted to practice in all of the courts of the State of California.

That on or about the 1st day of December, 1936, your affiant was requested by Dinkelspiel & Dinkelspiel, Esqs., attorneys for the plaintiff herein, to verify the addresses [77] of the various defendants in the above entitled action, many of whom resided in and about Los Angeles, California, and among the defendants included in said inquiry was one Grace Appleton McKey. The address given for the said Grace Appleton McKey was 1550 North Fairfax Avenue, Hollywood, California. That on or about the 10th day of December, 1936, your affiant went to 1550 North Fairfax Avenue, Hollywood, California, where he saw a neighbor at the next house and he inquired of the neighbor whether or not "Grace McKey" and Kathryn Riddell lived in that house, indicating 1550 North Fairfax Avenue, Hollywood, California. The man whom your affiant saw stated that said parties had moved from there and did not live there and that he did not know where they now lived and that new people had moved in. Nevertheless, your affiant went to the door and knocked, but no one answered.

That at or about the same time your affiant checked the records of suits in the Superior Court of Los Angeles County in an endeavor to ascertain the whereabouts of Grace Appleton McKey. Your affiant discovered a suit, No. 340,448, in the Superior Court of Los Angeles County, State of California, which was a suit brought by E. Clem Wilson, assignee of Meyer & Holler.

The suit was instituted May 12, 1932, and it was a suit wherein forty defendants were involved, one of which was Grace Appleton McKey. Each defendant was being sued for his proportionate shareholders' liability. The file disclosed that a writ of attachment was issued, but there was no return on the attachment. The file also indicated that on June 21, 1935, Grace Appleton McKey, a defendant in that action who is also a defendant in the above entitled action, was represented by Fleming & Robbins, Esqs., with offices in the Los Angeles Stock Exchange Building, 639 South Spring Street, Los Angeles, California. The [78] file further disclosed that she was given a dismissal with prejudice as of July 2, 1935. Said attorneys were in the same office building with your affiant and your affiant was acquainted with a law clerk employed by said attorneys, and your affiant requested said law clerk, whose name he does not recall, to ascertain the address of a client of the office, Grace Appleton McKey. That on or about the 14th day of December, 1936, the said law clerk advised your affiant that the last address known to said attorneys was 116 South Clybourne, Burbank, Cali-

fornia, and accordingly, on or about the 14th day of December, 1936, your affiant advised the attorneys for the plaintiff herein that Grace Appleton McKey did not reside at 1550 North Fairfax Avenue, Hollywood, California, which was the address given by them to him for purposes of investigation, but in truth and in fact the said Grace Appleton McKey was residing at 116 South Clybourne, Burbank, California.

That on or about the 10th day of March, 1937, your affiant advised the attorneys for the plaintiff herein that in view of their statement that the marshal was unsuccessful in serving the said Grace Appleton McKey at 116 South Clybourne, Burbank, California, that it would be satisfactory with him if an order of the United States District Court for the Northern District of California be made naming affiant as the party to make service upon the defendant Grace Appleton McKey.

That thereafter, on or about the 17th day of March, 1937, your affiant was informed by the attorneys for the plaintiff herein that they had obtained an order by the United States District Court Judge in the above entitled action designating him as a party to make service of the alias subpoena on the defendant Grace Appleton McKey. Your affiant also received, in addition to said alias subpoena, a copy of the subpoena and [79] complaint for service upon the defendant Grace Appleton McKey.

That on or about the 15th day of March, 1937, your affiant went to 116 South Clybourne, Bur-

bank, California, bearing with him the original alias subpoena, together with a copy of the complaint and subpoena to be served upon the defendant Grace Appleton McKey. That at that time and place he saw two persons who advised your affiant, after inquiry made by him concerning the whereabouts of Grace Appleton McKey, that they did not know of such party's living there or having lived there; that said persons told your affiant that they were tenants of said premises and did not know who owned the premises; that said persons stated to your affiant that they had never heard of either Grace Appleton McKey or Kathryn Riddell, whom your affiant at that time believed to be the sister-in-law of the said Grace Appleton McKey.

On or about the 31st day of March, 1937, bearing with him the original alias subpoena, together with the copy of the complaint and subpoena for service upon Grace Appleton McKey, your affiant went to Hermosa Beach, California, and at about 7:30 A. M. of said day knocked on the door of that certain bungalow at 119 24th Street, Hermosa Beach, California. There was no response, and your affiant waited for several hours, at all times observing the premises. Immediately thereafter, your affiant went to the local postoffice at Hermosa Beach, California, where he interviewed Marvin Wick, the Postmaster, and who advised him that Kathryn Riddell, who resided at 119 24th Street, Hermosa Beach, California, received her mail at a postoffice box in the Hermosa Beach postoffice; that he did not know

her personally and that he did not know, nor had he ever heard of Grace Appleton McKey. [80]

That thereafter, your affiant returned to said bungalow at 119 24th Street, Hermosa Beach, California, and again knocked at the door, but there was no response. Thereafter your affiant returned to Los Angeles, California, and stopped off at 1550 North Fairfax Avenue, Hollywood, California, in the evening of said day, to-wit, March 31, 1937, at or about 9:00 P. M. Your affiant observed that the house was illuminated, indicating occupancy, but when your affiant knocked on said door at said place no one answered.

That thereafter, your affiant walked back and forth in front of said house to observe whether there were any persons in there, but nobody appeared.

That the next day, to-wit, April 1, 1937, your affiant again returned to 1550 North Fairfax Avenue, Hollywood, California, and he was advised by a different neighbor that "Grace McKey" did not live there. Nevertheless, your affiant again knocked on said door, but no one answered. That between April 15 and April 27, 1937, your affiant made two visits to said address 1550 North Fairfax Avenue, Hollywood, California, and still another neighbor advised him that new people had moved in there and that as far as he knew, there was no "Grace McKey" living there or around there.

That the reason that your affiant made continuous visits to said address at 1550 North Fairfax Avenue, Hollywood, California, was to ascertain from the tenants therein whether in truth and in

fact the said Grace Appleton McKey had moved to 116 South Clybourne, Burbank, California, and to discover from neighbors to what address the said Grace Appleton McKey had moved.

Your affiant, having been unsuccessful in locating [81] the defendant Grace Appleton McKey at 1550 North Fairfax Avenue, Hollywood, California, at 116 South Clybourne, Burbank, California, or at 119 24th Street, Hermosa Beach, California, personally typed a dummy letter, the original of which is attached to this affidavit and marked Exhibit "A" and incorporated herein by reference. Said letter was sent Registered Mail, Return Receipt Requested, with the further request that the postoffice designate the address where delivered. That said letter was addressed to Mrs. Grace Appleton McKey, 116 South Clybourne, Burbank, California, and was duly deposited in the Post Office at Los Angeles, California, at the Metropolitan Station, Los Angeles, California, with postage prepaid. That thereafter your affiant received the return of said letter with the following marks and notations: "Returned to writer, unclaimed", together with a striking out of the address 116 South Clybourne, Burbank, California, and the superimposition of the address 119 24th Street, Hermosa Beach, California, and the carrier's initials, which appear to be "9H" and a notation "Not at". That said letter carried your affiant's name and his then address, 901 Continental Building, Los Angeles, to which said letter was returned.

That on or about the 15th day of June, 1937,

your affiant again returned to 1550 North Fairfax Avenue, Hollywood, California, and waited there several hours for someone to appear after he had approached the door and knocked thereon. He saw some persons passing by into the houses in said block who, after inquiry, stated that they did not know "Grace McKey"; that there were new people living in the house, and that they did not know that a person of that name had ever resided at 1550 North Fairfax Avenue, Hollywood, California. [82]

That your affiant attempted to ascertain the telephone listing at 1550 North Fairfax Avenue, Hollywood, California, during the period of his visits there. He ascertained that there was no telephone listed at said address.

That on or about the 10th day of September, 1937, your affiant ascertained the confidential telephone number at 116 South Clybourne, Burbank, California, which was Burbank 2779-J, and the person answering the telephone stated that she had never heard of Mrs. Riddell or Mrs. McKey and that she did not know of any such person living at that address. That your affiant checked the then current telephone directories, and city directories for the years 1936, 1937 and 1938 during the time that he made his investigation, but his investigation disclosed no listing for Grace Appleton McKey.

That your affiant has read the affidavit of Fred S. Herrington in support of an application for an order for publication of summons, and that the matters stated therein as pertains to the efforts

of your affiant to locate and serve the defendant Grace Appleton McKey are true and correct.

Dated: At Los Angeles, California, this 6th day of August, 1942.

LEO K. GOLD

Subscribed and sworn to before me this 7th day of August, 1942.

[Seal] FLORA SETTLES,
Notary Public in and for the County of Los Angeles, State of California.

My Commission expires March 7, 1943. [83]

EXHIBIT A



10 FEET
10 FEET

115-2451-A
May 17 1937
Heron's Beach 74
Mrs. Grace A. Mickey
~~116-2451-A~~
South Croydon
London, California
RECEIVED
318
DELIVERED

REGISTERED 355313

ALI PROPERTY
SHIPPING & RECEIVING
DELIVERED

Leo K. Gold
901 Continental Building
Los Angeles, California



[Title of District Court and Cause.]

AFFIDAVIT OF JAMES P. LAVELLE

State of California,
County of Los Angeles—ss.

James P. Lavelle, being first duly sworn, deposes and says:

That he is and at all times hereinafter mentioned was a deputy attached to the United States District Court for the Southern District, Central Division; that on or about the 16th day of December, 1936, he was instructed, in connection with his duties as said marshal, to serve a copy of the complaint in [85] the above entitled matter, together with a copy of a subpoena, upon the defendant Grace Appleton McKey; that on or about the said 16th day of December, 1936, bearing the original subpoena and a copy of the complaint and subpoena, your affiant went to 116 South Clybourne, Burbank, California, where he attempted to serve the defendant Grace Appleton McKey; that although he made an attempt to effect such service, he was unable to locate the defendant Grace Appleton McKey for such purpose after the exercise of due diligence on his part.

Dated: At Los Angeles, California, this 7 day of August, 1942.

JAMES P. LAVELLE

Subscribed and sworn to before me this 7 day
of August, 1942.

LEONARD B. LYONS

Notary Public in and for the County of Los An-
geles, State of California.

My Commission Expires Nov. 24, 1943.

[Endorsed]: Filed Aug. 10, 1942. [86]

In the Southern Division of the United States Dis-
trict Court for the Northern District of Cali-
fornia.

No. 4103R

In Equity

JAMES W. BUTLER; MARY L. BUTLER;
MARY SEGUIN; CLARA VERSCHOOR;
LILLIAN FITZGERALD; DAVID J.
LEWIS; ELIZABETH A. LEWIS; JOHN
LINGIE SMITH; ELLA RUTH SMITH;
PATRICK J. LEONARD; ANNIE LEON-
ARD; STEPHEN C. PERRY; CARLE HIL-
LEBRAND; MRS. C. C. E. HILLEBRAND;
FRED HUSSEY; MRS. H. L. GOOCH; OS-
CAR SWANSON; MARVIN WALTER WA-
FER; GEORGE W. IRVINE; BETTY DU
BOIS; MRS. I. B. BRAWLEY; MARGARET
JOHNSTONE; JAMES J. PHELAN; J. H.
PEGRAM; MRS. J. H. PEGRAM; MARIE
C. KNIEF; AMOS WASHINGTON; DORO-

THY LEWITZ; MARIE C. CROSS; VIO-
LETTE M. CROSS; CHARLES L. FORS-
BERG; and MADGE McNAUL;

Plaintiffs,

vs.

CHARLES M. PUSEY; SIEGFRIED SCHU-
LEIN, JUNIOR; SIEGFRIED SCHULEIN;
WILLIAM FORSSTROM; GRACE APPLE-
TON McKEY; E. E. FRICKE; ERMA A. LA
NOUE; MARK M. BAKER; ERMA M. ASZ-
MAN; LEONE B. HILL; MRS. L. E. HILL;
and KATHRYN RIDDELL;

Defendants.

**ORDER DENYING DEFENDANT'S MOTION
TO DISMISS AND PLAINTIFFS' MOTION
TO FILE AFFIDAVITS; GRANTING MO-
TION TO QUASH SERVICE OF SUM-
MONS AND SETTING ASIDE DEFAULT
JUDGMENT.**

Ordered that defendant Grace Appleton McKey's motion to dismiss the within action be, and the same is hereby Denied; that plaintiffs' motion to file affidavits of Leo K. Gold and James P. Lavelle be, and the same is hereby Denied; that said defendant's motion to quash service of summons upon her be, and the same is hereby Granted; that the judgment by default by the Clerk of this court entered herein against said defendant on April 18, 1939, be, and the same is hereby Vacated, and that said defendant be given thirty (30) days from

the date hereof within which to answer the complaint on file herein.

Dated: December 4, 1942.

MICHAEL J. ROCHE

United States District Judge.

[Endorsed]: Filed Dec. 5, 1942. [87]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given, that the plaintiffs above named hereby appeal to the Circuit Court of Appeals for the Ninth Circuit, from the order of the District Court of the United [88] States, Northern District of California, Southern Division, entered in this action on December 5, 1942 to the effect that the above named plaintiffs' Motion to file affidavits of Leo K. Gold and James F. Lavelle be denied; that said defendant, Grace Appleton McKey's Motion to quash service of summons upon her be granted; that the judgment by default of the Clerk of the above named District Court of the United States entered herein against said defendant on April 18, 1939, be vacated.

Dated: January 4, 1943.

DINKELSPIEL & DINKEL-SPIEL

Attorneys for said Plaintiffs
and Appellants.

[Endorsed]: Filed Jan. 4, 1943. [89]

[Title of District Court and Cause]

DESIGNATION OF CONTENTS OF
RECORD ON APPEAL

To the above-entitled Court, and to the Clerk of said Court, and to Grace Appleton McKey, and to Messrs. Sullivan, Roche and Johnson, her attorneys:

Come now James W. Butler, et al, appellants herein, and, in accordance with Rule 75 (a) of the Federal Rules of Civil Procedure, designate the following as the portions of the record, proceedings and evidence to be contained in the Record on Appeal, notice of which said appeal was heretofore filed herein on the 4th day of January, 1942, viz:

[90]

- (1) Appellants' verified complaint, dated November 18, 1936;
- (2) Subpoena Ad Respondendum issued to Charles M. Pusey, et al, dated November 19, 1936, with Clerk's certificate;
- (3) United States Marshal's returns dated November 30, 1936, December 16, 1936, and February 10, 1937 on attempted service of the above described subpoena, on appellee, Grace Appleton McKey;
- (4) United States Marshal's return on service of said subpoena on defendant Kathryn Riddell, dated December 11, 1936;
- (5) United States Marshal's return on service of said subpoena on defendant Charles M. Pusey at Oakland, California, dated November 20, 1936;

(6) Praeclipe for alies subpoena and ad respondentum dated and filed March 15, 1937, with clerk's certificate showing issue of subpoena;

(7) Order designating and appointing a person other than marshal, namely Leo K. Gold, to serve process, dated March 15, 1937;

(8) Praeclipe for alias subpoena ad respondentum against appellee, filed January 16, 1939, with clerk's certificate showing issue of subpoena;

(9) Summons directed to appellee, dated January 16, 1939 and filed April 14, 1939;

(10) Motion for order for Publication of Summons upon Appellee Grace Appleton McKey, dated January 16, 1939;

(11) Affidavit of Fred S. Herrington for order for publication of summons, dated January 14, 1939 and filed [91] January 16, 1939;

(12) Order for publication of summons dated and filed January 16, 1939;

(13) Affidavit of publication of summons on appellee, filed April 14, 1939;

(14) Praeclipe for entry of default and judgment by default against appellee dated April 18, 1939;

(15) Affidavit of Fred S. Herrington for default judgment, dated and filed April 18, 1939;

(16) Judgment by default by clerk against appellee dated and filed April 18, 1939;

(17) Final decree pro confesso against defendant Kathryn Riddell, dated and filed March 30, 1937;

- (18) Notice of motion of appellee, filed July 23, 1942;
- (19) Affidavit of appellee, dated July 18, 1942;
- (20) Appellants' notice of motion, dated and filed August 10, 1942;
- (21) Affidavit of Leo K. Gold, dated August 6, 1942, and filed August 10, 1942;
- (22) Affidavit of James P. Lavelle, dated August 7, 1942, and filed August 10, 1942;
- (23) Order of court, dated December 4, 1942, and filed December 5, 1942.

Dated: at San Francisco, California, this 14th day of January, 1943.

Respectfully submitted,

DINKELSPIEL & DINKEL-
SPIEL

By MARTIN J. DINKELSPIEL

Attorneys for Appellants [92]

Receipt of a copy of the within Designation of Contents of Record on Appeal is hereby acknowledged this 14th day of January, 1943.

SULLIVAN, ROCHE and
JOHNSON

By MILTON D. HARRIS

Attorneys for Appellee.

[Endorsed]: Filed Jan. 14, 1943. [93]

[Title of District Court and Cause.]

**STIPULATION "RE" RECORD
ON APPEAL**

It Is Hereby Stipulated that Appellants' "Designation of Contents of Record on Appeal," filed in compliance with Rule 75 (a) of the Federal Rules of Civil Procedure, shall be, and the same is hereby amended by striking therefrom the following:

From designation No. 21 and designation 22, the words "and filed August 10, 1942."

The said amendment is based upon the fact that the affidavits described in said designations were not filed but are attached to Appellants' notice of motion described in designation No. 20, on which motion appellants sought leave of the Court for filing. [94]

It is further stipulated that as above corrected the documents described in appellants' said "Designation" shall constitute the record on appeal of the said cause.

Dated: January 25th, 1943.

**SULLIVAN, ROCHE &
JOHNSON**

Attorneys for Appellants
**DINKELSPIEL & DINKEL-
SPIEL**

Attorneys for Appellee

[Endorsed]: Filed Jan. 25, 1943. [95]

[Title of District Court and Cause.]

CONCISE STATEMENT OF POINTS TO BE
RELIED UPON BY APPELLANTS ON
APPEAL AND DESIGNATION OF PARTS
OF THE RECORD UNDER RULES 75
(a and d) OF THE FEDERAL RULES OF
CIVIL PROCEDURE [96]

Come now James W. Butler, et al., appellants herein, and in accordance with Rule 75 (d) of the Federal Rules of Civil Procedure, specify the following as a concise statement of the points on which said appellants intend to rely on the appeal heretofore perfected (and filed in the above entitled court) from the order made and entered by Honorable Michael J. Roche, Judge of the United States District Court for the Northern District of California, on the 5th day of December, 1942, and more particularly specified and described in the notice of such appeal dated January 4, 1943, and filed with the Clerk of said District Court on the 4th day of January, 1943, viz:

That said portion of said order of said District Judge entered in said District Court on the 5th day of December, 1942, wherein and whereby and to the extent that by said order said District Judge denied the motion of appellants herein, to file affidavits of Leo K. Gold and James P. Lavelle, granted the motion of appellee Grace Appleton McKey to quash service of summons upon her; vacated the judgment by default by the Clerk of said District Court entered herein against said appellee on April 18,

1939, was and is erroneous and contrary to law, in that:

(a) Said order herein appealed from as to that portion thereof wherein and whereby said judgment by default entered against said appellee Grace Appleton McKey, is vacated, was made in the absence of any motion of said appellee to vacate said judgment; [97]

(b) That said District Court had and has no jurisdiction upon a motion to vacate a final judgment entered in a prior term of the court if six (6) months have expired after the entry of such judgment, as is more particularly described and defined in Rules 55 and 60(b) of the Federal Rules of Civil Procedure;

(c) That even assuming the existence of such jurisdiction in the Court, there were and are no sufficient factual or legal grounds warranting the court's action in vacating said judgment;

(d) That said District Court had and has no jurisdiction to quash service of summons after the judgment by default had become final, and that even if such jurisdiction did exist there were no factual or legal grounds warranting the Court's action in quashing service of summons;

(e) That said appellee, by making her motion to dismiss the complaint herein and pleading matters concerning the merits of the case and the Court's jurisdiction of the subject matter of the complaint, and by participating in the hearing upon said motion, waived the right to have the service of summons quashed and thereby voluntarily sub-

mitted her person to the jurisdiction of said District Court;

(f) That appellants were and are entitled to file the supplementary affidavits of Leo K. Gold and James P. Lavelle in accordance with their motion, and that said affidavits eliminated all possible doubts as to the validity of the service of summons made upon the appellee.

Dated: at San Francisco, California, this 14th day of January, 1943.

Respectfully submitted,

DINKELSPIEL & DINKEL-SPIEL

By MARTIN J. DINKELSPIEL

Attorneys for Appellants

Receipt of Service.

Receipt of a copy of the within Concise Statement of Points to be Relied Upon by Appellants on Appeal, is hereby acknowledged this 14th day of January, 1943.

SULLIVAN, ROCHE and
JOHNSON

By MILTON D. HARRIS

Attorneys for Appellee

[98-A]

[Endorsed]: Filed Jan. 14, 1943. [98]

[Title of District Court and Cause.]

**ORDER EXTENDING TIME FOR FILING
RECORD ON APPEAL AND DOCKETING
ACTION IN CIRCUIT COURT OF AP-
PEALS (Rule 73G)**

On application of Dinkelspiel & Dinkelspiel, Attorneys for plaintiffs in the above entitled action, and good cause appearing therefor,

Now Therefore, it is Ordered, that the time of plaintiffs for filing the Record on Appeal and for docketing the above entitled action on appeal for the Circuit Court of Appeals, Ninth Circuit, in pursuance of Notice of Appeal heretofore filed by plaintiffs, be and the same is hereby extended to and including the 5th day of March, 1943.

The within Order is made upon the provisions of Rule 73 (G) in the rules of Federal Court Procedure.

Dated February 9th, 1943.

MICHAEL J. ROCHE

Judge of the United States
District Court, Northern
District of California

[Endorsed]: Filed Feb. 9, 1943. [99]

District Court of the United States
Northern District of California

CERTIFICATE OF CLERK TO TRANSCRIPT
OF RECORD ON APPEAL

I, Walter B. Maling, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing 99 pages, numbered from 1 to 99, inclusive, contain a full, true, and correct transcript of the records and proceedings in the case of James W. Butler, et al, Plaintiffs, vs. Charles M. Pusey, et al, No. 4103-R, as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on appeal is the sum of Thirteen Dollars and Eighty-Five Cents (\$13.85) and that the said amount has been paid to me by the Attorney for the appellant herein.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at San Francisco, California, this 4th day of March A. D. 1943.

[Seal]

WALTER B. MALING

Clerk

WM. J. CROSBY

Deputy Clerk [100]

[Endorsed]: No. 10381. United States Circuit Court of Appeals for the Ninth Circuit. James W. Butler, Mary L. Butler, Mary Seguin, Clara Verschoor, Lillian Fitzgerald, David J. Lewis, Elizabeth A. Lewis, John Lingie Smith, Ella Ruth Smith, Patrick J. Leonard, Annie Leonard, Stephen C. Perry, Carle Hillebrand, Mrs. C. C. E. Hillebrand, Fred Hussey, Mrs. H. L. Gooch, Oscar Swanson, Marvin Walter Wafter, George W. Irvine, Betty Du Bois, Mrs. I. B. Brawley, Margaret Johnstone, James J. Phelan, J. H. Pegram, Mrs. J. H. Pegram, Marie C. Krief, Amos Washington, Dorothy Lewitz, Marie C. Cross, Violette M. Cross, Charles L. Forsberg and Madge McNaul, Appellants, vs. Grace Appleton McKey, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

Filed March 5, 1943.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 10381

JAMES W. BUTLER, et al,

Appellants,

vs.

GRACE APPLETON McKEY,

Appellee.

CONCISE STATEMENT OF POINTS TO BE
RELIED UPON BY APPELLANTS ON
APPEAL UNDER RULE 1916

Come now, James W. Butler, et al, appellants herein and as statement of points to be relied upon by them on their appeal herein they hereby adopt the statement of points filed by them on January 14, 1943, with the Clerk of the United States District Court for the Northern District of California, in accordance with Rule 75 (a) of the Federal Rules of the Civil Procedure.

Dated at San Francisco, California, this 16th day of February, 1943.

Respectfully submitted,

DINKELSPIEL & DINKEL-
SPIEL

By (Illegible)

Attorneys for Appellants

[Endorsed]: Filed Mar. 5, 1943. Paul P.
O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

DESIGNATION OF PARTS OF RECORD
NECESSARY FOR THE CONSIDERATION
OF APPEAL UNDER RULE 1916.

Come now, James W. Butler, et al, appellants herein, and hereby designate, as the parts of the record which they think necessary for the consideration of such appeal, the entire record as contained in the transcript of said record on appeal heretofore transmitted to the Clerk of the above-entitled Court by the Clerk of the United States District Court for the Northern District of California.

Dated at San Francisco, California, this 16th day of February, 1943.

Respectfully submitted,

DINKELSPIEL & DINKELSPIEL,
By (Illegible)

Attorneys for Appellants.

[Endorsed]: Filed Mar. 5, 1943. Paul P.
O'Brien, Clerk.